160 U.S. 438

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 152.

THE SOUTHERN PACIFIC COMPANY, PLAINTIFF IN ERROR,

vs.

MALOLA POOL, ADMINISTRATRIX OF JOSEPH S. POOL, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED MAY 4, 1891.

(14,623.)

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INDEX.

	Original.	Print.
Caption	*a*	1
Transcript from district court	1	1
Complaint	1	1
Answer	4	2
Judgment	7	4
Order extending time to file statement, &c.	8	4
Notice of intention to move for new trial	9	5
Statement on motion for new trial	12	6
Testimony of Malola Pool	13	6
Frank J. Fowers	16	8
George C. Rice	48	24
A. C. Fell	57	28
Motion for nonsuit	66	33
Charge to jury	67	33
Assignment of errors	83	41
Judge's certificate to statement	85	42

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	Original.	Print.
Order denying motion for new trial	85	42
Notice of appeal	86	42
Clerk's certificate	87	42
Order taking cause under advisement	88	42
Judgment	88	42
Order fixing amount of bonds	89	42
Opinion	90	43
Dissenting opinion	100	48
Citation	106	51
Proof of service of citation	107	52
Assignment of errors	108	52
Writ of error	111	54
Bond	114	54
Clerk's certificate	117	56

a Supreme Court of Utah.

File No. 110.

In the Supreme Court of Utah Territory.

MALOLA POOL, Administratrix, etc, Plaintiff and Respondent,
vs.
THE SOUTHERN PACIFIC CO., Defendant and Appellant.

Transcript on Appeal.

Marshall & Royle, attorneys for appellant and defendant; Kimball & White, E. M. Allison, attorneys for plaintiff and respondent.

Marked: Filed July 30, 1890.

JOS. P. BACHE, *Clerk.*

1 TERRITORY OF UTAH, } ss:
County of Weber,

In the District Court of the First Judicial District of Utah.

MALOLA POOL, Administratrix of the Estate of JOSEPH S. POOL, Deceased, Plaintiff,
vs.
THE SOUTHERN PACIFIC COMPANY (a Corporation), Defendant.

Complaint.

Plaintiff complains of the defendant and for cause thereof alleges:

That on or about the 20th day of May, A. D. 1889, letters of administration upon the estate of Joseph S. Pool, deceased, were duly issued by the probate court of the county of Weber in said
2 Territory of Utah to the plaintiff by which she was appointed administrator of all the goods and credits belonging to said Joseph S. Pool at the time of his death and she therefore was qualified and entered upon her duties of such administration.

That plaintiff was the wife of the deceased Joseph S. Pool at the time of his death and is now his widow; that there are now living issue of plaintiff and said Joseph S. Pool two children, Joseph E. Pool, a boy aged nine years, and Mary M. Pool, a girl aged four years.

That The Southern Pacific Company, defendant as aforesaid, is a corporation duly established by law under the laws of the State of Kentucky, with power to sue and be sued and was such a corporation on September 13th, 1888.

That the defendant for more than one year last past has been operating a railroad and running freight and passenger trains between Ogden, Utah, and San Francisco, California, and occupies and maintains repair and manufacturing shops for repairing and constructing railroad implements for said road, and has so used and maintained said shops for more than one year last past.

That on September 12th, 1888, immediately before death of said Joseph S. Pool and for one year immediately preceding said time said Joseph S. Pool had been employed as a laborer for said company in said repair shops.

That on or about said September 12th, 1888, said deceased was ordered by the defendant to go and repair a car of defendant's
3 on its track near said shops.

That while engaged repairing said car and while between it and another car defendant and its servants, for want of due care and attention to duty in that behalf, negligently and carelessly run and caused to be run against the car on which plaintiff was at work an engine and other cars with great violence, whereby said Joseph S. Pool was greatly cut, bruised, crushed and wounded, so that Joseph S. Pool became sick and after lingering for about one day died by reason of said injury on or about September 13th, 1888.

That by reason of the premises the plaintiff as such adminstratrix of the estate of said Joseph S. Pool, deceased, has sustained damages in the sum of twenty thousand dollars.

Wherefore plaintiff as administratrix of said estate demands judgment against the defendant in the sum of twenty thousand dollars and for her costs of this suit.

KIMBALL & WHITE,
Attorneys for Plaintiff.

TERRITORY OF UTAH, }
County of Weber, } *ss:*

Malola Pool being duly sworn deposes and says she is the plaintiff in the above-entitled action; that she has heard read the
4 foregoing complaint and knows its contents, that the same is true of her own knowledge except as to matters therein stated upon information and belief and as to these matters she believes it to be true.

MALOLA POOL.

Subscribed and sworn to before me this 25th day of May, A. D. 1889.

[SEAL.] WALLACE R. WHITE,
Notary Public.

Endorsed: Filed May 28th, 1889. H. H. Henderson, clerk. Kimball & White, attorneys for plaintiff.

(Title of Court and Cause.)

Answer.

The above-named defendant for answer to the complaint of the said plaintiff, says:

As to the allegations in said complaint, "that on or about the 20th day of May, A. D. 1889, letters of administration upon the estate of Joseph S. Pool, deceased, were duly issued by the probate court of the county of Weber in said Territory of Utah to the plain-

tiff by which she was appointed administrator of all the goods and credits belonging to said Joseph S. Pool at the time of his death and she therefore qualified and entered upon her duties as such administrator. That plaintiff was the wife of the deceased
5 Joseph S. Pool at the time of his death and is now his widow; that there are now living, issue of the plaintiff, and said Joseph Pool two children, Joseph E. Pool, a boy aged nine years, and Mary M. Pool, a girl aged four years," this defendant has no information or belief sufficient to answer the same, and therefore deny the same, placing *his* denial on that ground.

Defendant denies that said Joseph S. Pool on or about September 12th, 1888, was ordered by defendant to go *or* repair a car of defendant on its track near its said shops, or elsewhere, or that while engaged repairing said car or while between it and another car defendant or its servants for want of due care or attention to duty in that behalf negligently or carelessly run or caused to be run against the car on which defendant was at work an engine or other cars with great or any violence, or that thereby said Joseph S. Pool was greatly or at all cut, bruised, crushed or wounded, or that Joseph S. Pool became sick, or after lingering about one day or at all died by reason of said injury on or about September 13th, 1888, or at all.

Denies that by reason of the premises the plaintiff as such administratrix of the estate of said Joseph S. Pool, deceased, or otherwise has sustained damages in the sum of twenty thousand dollars or any other sum whatever.

And defendant for further answer to plaintiff's said com-
6 plaint alleges that at and prior to the date of said alleged accident the said Joseph S. Pool was employed at or about defendant's shops, and that it was no part of deceased's duties to repair or assist in repairing cars on defendant's tracks. That the said deceased was injured while performing services not within the scope of his employment, and through and by reason of his own carelessness and disregard of the rules of defendant, and of ordinary care and caution, and by the like carelessness of his fellow-servants, and for which and for whom this defendant is in nowise responsible. Wherefore defendant prays to be hence dismissed with its costs.

MARSHALL & ROYLE,
Attorneys for Defendant.

TERRITORY OF UTAH, }
County of Salt Lake, } *ss:*

Thomas Marshall being first duly sworn on his oath says: I am one of the attorneys of the above-named defendant, I have read the foregoing answer and know the contents thereof, and the same is true of my own knowledge except as to matters therein stated on information and belief, and as to those matters I believe it to be true, the reason this verification is made by affiant, is that none of the officers of defendant are in the county of Salt Lake to verify the

same, said county being where affiant resides, that affiant's
7 information and belief are derived from statements made to
him by the agents and employees of defendant cognizant of
the facts.

THOMAS MARSHALL.

Sworn to before me this 11th day of September, 1889.

HARRY T. DUKE,
[SEAL.] *Notary Public.*

Endorsed: Copy served on us September 12th, 1889. Kimball & White, attorneys for plaintiff. Filed September 12th, 1889. H. H. Henderson, clerk.

(Title of Court and Cause.)

Judgment on Verdict in Open Court 4th Day of April, A. D. 1890.

This action came on regularly for trial. The said parties appeared by their attorneys W. R. White and E. M. Allison counsel for plaintiff and Marshal & Royle for defendant. A jury of twelve persons was regularly empaneled and sworn to try said action. Witnesses on the part of plaintiff and defendant were sworn and examined. After hearing the evidence, the arguments of counsel, and instructions of the court, the jury retired to consider of their verdict, and
subsequently returned into court, and, being called, answered
8 to their names, and on their oaths say:

"We, the jury empaneled in the above-entitled action find the issues joined therein in favor of the plaintiff and against the defendant, and assess the damages of the plaintiff at the sum of $10,000.

JOHN L. CORLEW, *Foreman.*"

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged and decreed, that said plaintiff do have and recover from said defendant the sum of ten thousand dollars and her costs and disbursements incurred in this action, amounting to the sum of $91.55.

Judgment recorded the 4th day of April, A. D. 1890, in Book —, page —.

(Title of Court and Cause.)

Order Extending Time to File Statement.

On motion of defendant's counsel it is ordered that defendant be and it is hereby given 60 days in which to prepare and file notice of intention to move for a new trial, and also to prepare statement on motion for a new trial, and in the meanwhile execution is ordered to be stayed.

Done in open court April 4th, 1890.

H. P. HENDERSON, *Judge.*

9 (Title of Court and Cause.)

Notice of Intention to Move for a New Trial.

To Kimball & White and E. M. Allison, attorneys for plaintiff:

Take notice that defendant, The Southern Pacific Company, intends to move the court to vacate and set aside the verdict rendered in the above cause, and to grant a new trial of said cause upon the following grounds, to wit:

1. Excessive damages, appearing to have been given under the influence of passion or prejudice.

2. Insufficiency of the evidence to justify the verdict and the same is against the law in this court.

a. It fails to show any fault or negligence on the part of the defendant.

b. It shows contributory negligence on the part of plaintiff's intestate in not placing a red flag in front of the car where said deceased was at work, as a signal of danger, and in not seeing that the engineer of the switch-engine was notified of Pool's presence under the car.

c. It shows that the only negligence other than Pool's (if any) that occasioned the injury was that of Switchman Kilpatrick, who was a fellow-servant of the deceased.

3. Errors in law occurring at the trial and excepted to by the defendant, as follows, to wit:

10 *a.* The court erred in overruling defendant's motion for a nonsuit.

b. The court erred in its instructions to the jury of its own motion: 1st. In instructing the jury "that if they found that Pool was a car-repairer and in a different line of service from that of the negligent (if any such there was) servant of the company, and that his (Pool's) death was caused by such negligence of such servant, then defendant was liable," or language to that effect. 2nd. In submitting as a question of fact to the jury whether the car-repairer, Pool, was a fellow-servant with the switchman Kilpatrick. 3rd. In instructing the jury that the trainmen or yardmen of defendant were not fellow-servants of deceased. 4th. The court erred in instructing the jury that in estimating damages "they should determine the number of the family of deceased, the number of children, and ages of the family."

c. The court erred in giving the instructions given on its own motion, and in giving each distinct part thereof.

d. The court erred in giving the instructions asked by the plaintiff and in giving any or either of them.

e. The court erred in refusing to charge the jury *pre*emptorily to find for the *de*fendant, as by it requested.

11 Said motion will be made upon a statement of the case hereafter to be prepared.

MARSHALL, ROYLE & BOREMAN,
Attorneys for Defendant.

Endorsed: Copy served on us this 12th day of May, 1890. Kimball, White & Allison, attorneys for plaintiff. Filed May 12th, 1890. H. H. Henderson, clerk, by L. B. Best, deputy clerk.

12 In the District Court of the First Judicial District, Territory of Utah, County of Weber.

MALOLA POOL, Administratrix, etc., Plaintiff,
vs.
THE SOUTHERN PACIFIC COMPANY, Defendant.

Defendant's Proposed Statementon Motion for a New Trial; also Appeal.

This cause came regularly on for trial in said court, on Thursday, April 3rd, 1890, at 10 o'clock a. m., before the Hon. Henry P. Henderson, judge, and a jury; the plaintiff appearing by Messrs. Kimball & Allison and W. R. White, her attorneys, and the defendant by Messrs. Marshall & Royle and Jacob S. Boreman, its attorneys, and the following proceedings were had, testimony taken, objections made, and rulings of the court and exceptions entered:

13 Mr. WHITE: I offer in evidence the records from the probate office. It is the letters of administration in this case—in the case of Joseph S. Pool, deceased. It is admitted that these are the papers in the case of Joseph S. Pool, deceased, and among the records of the probate court of this county.

Mr. MARSHALL: Subject, sir, to our objections.

Mr. WHITE: We offer them as the papers showing that the administratrix was appointed.

The COURT: They may be received, subject to objections.

Mr. ALLISON: I understand it is admitted that these papers come from the proper custodian?

Mr. MARSHALL: Yes, we won't object to that as a matter of form.

MALOLA POOL, being sworn on behalf of the plaintiff, and examined by Mr. White, testified as follows:

Q. Mrs. Pool, you reside in this town, I believe?
A. Yes, sir.
Q. You have resided here how long?
A. For ten years—eleven years, I guess.
Q. Are you the plaintiff in this case?
A. Yes, sir.
Q. Are you the Malola Pool mentioned, who took out letters of administration in the probate court?
A. Yes, sir.
Q. Have you been acting as such administratrix since the time you were appointed?

14 A. Yes, sir.
Q. Did you know Joseph S. Pool?
A. Yes, sir.
Q. What relation did he ever bear to you?
A. He was my husband.

Q. When did he die?
A. He died on the 14th of September, 1888.
Q. What year?
A. 1888.
Q. Did you and the deceased have any children?
A. Yes, sir; we had two.
Q. What were their names and ages?
A. Joseph E. Pool; he was aged nine years when his father died; and Mary Ann Pool, aged four years.
Q. Now, then, you say the deceased died in September, 1888?
A. Yes, sir.
Q. Do you know what was the cause of his death?
A. Yes, sir; he was hurt on the C. P. cars, on the C. P. road, while laboring.
Q. What relation, at the time of his death, did he sustain to the Southern Pacific Company?
A. He was a laborer in the car shops.
Q. Was he a laborer for the company?
A. Yes, sir.
Q. Do you know how long he had been laboring for the company?
15 A. He had been nearly three years, or over three years, when he was here the last time.
Q. Was it in the same business that he was when he died?
A. Yes, sir.
Q. Had he been a laborer in any other car shops before that time?
A. No, sir.
Q. How old was he when he died?
A. He was 29 years old.
Q. 29 years old.
A. Yes, sir.
Q. What were his habits for sobriety?
A. Sir?
Q. What were his habits as to sobriety and industry?
A. I don't understand. Why, he was a very ambitious man to work; worked a great deal and hard. His habits were good. He never drank nor went away from home.
Q. What were his wages at the time that he died, or about that time?
A. Well, the month's wages that I drew after his death was $57.50, the month of August.
Q. Was that for the full month?
A. It was for the full month of August.
Q. What had been his wages previous to that time, more or less?
A. They had been less, but he had been raised a little while before that.
16 Q. Who was the foreman in the repair shops where he was at work?
A. Mr. Sherbon—A. Sherbon, I think, is his initials.

Q. Well, who was the foreman—was Sherbon the foreman or master mechanic?

A. I don't know—I think——

Q. Do you know Mr. Starr?

A. Mr. Starr is under Mr. Sherbon. I am not personally acquainted with him.

Q. Do you know who Mr. Pool's foreman was—immediate foreman?

Mr. MARSHALL: Well, we object, unless it is shown she knows.

The COURT: That is what the question was.

A. Yes, sir; I know that he was working under Mr. Starr.

FRANK J. FOWERS sworn for the plaintiff, and examined by Mr. WHITE, testified as follows:

Q. Mr. Fowers, where do you reside?

A. In Ogden.

Q. How long have you resided in Ogden?

A. Well, it is in the neighborhood of three years.

Q. What is your present business?

A. Car-repairing.

Q. For what company?

A. Southern Pacific.

Q. What were you doing in September, 1888?

17 A. Working at the Southern Pacific car shops.

Q. Were you doing the same, or a different business that you are doing now?

A. The same business, sir.

Q. Who was foreman of the Southern Pacific car shops at that time, in September, 1888?

A. Joseph Starr.

Q. How long had he been foreman?

A. I think he had been foreman something over ten years; at any rate I am informed——

Q. Who was the master mechanic?

A. A. Sherbon.

Q. Who was the man who had charge of the work—the superintending of the men in the repair shops for the Southern Pacific Company in September, 1888?

A. Mr. Sherbon, the master mechanic; he always hires the men that are employed there, but Mr. Starr is the foreman of the shops; he has charge of the men while working in the shop.

Q. Well, the men that are in there, whose orders are they subject to, whose immediate orders?

A. Mr. Starr and Mr Sherbon.

Q. Whose immediate orders?

A. Oh, Mr. Starr's.

Q. Did you know Joseph S. Pool in his lifetime?

A. I knew him when I first went to work at the car shop; that was the first introduction I had to him.

Q. When did you first know him?

18 A. It was the first introduction I had to him, I think, January or February, two years ago.

Q. That would be 1888?

A. Yes, sir.

Q. The same year that he was killed?

A. Yes, sir.

Q. Then you had known him, I believe, about nine years?

A. Yes, sir, I think so.

Q. Now, did you see Mr. Starr about September 12th, 1888? Excuse me, Mr. Pool?

A. Yes, sir.

Q. What was—was you working for the repair shop—at the repair shop at that time?

A. Yes, sir.

Q. That was in Ogden City?

A. Ogden City.

Q. Now state what, if anything, was Mr. Pool doing before any accident occurred to him?

A. He was repairing cars.

Q. At what place?

A. At the repair shop in Ogden.

Q. Did he repair cars at any other place than the repair shops that day?

A. Not that I know of.

Q. What, if anything, was done at the track to any car, by him?

A. You mean outside of the shop?

Q. Yes, sir.

A. Myself——

19 The COURT: On the day of his injury, I suppose?

A. Well, on that day him and me was sent out by the foreman, Joseph Starr, to repair a car, on—I think it was on track No. 1.

Q. Well, now, right there, on track No. 1; you say the first being indicated—indicate Mr. Fowers, how many tracks are there in that place belonging to the Southern Pacific Company?

A. Well, there is what is called the main line and I think two tracks west of that, and then on the east of it the tracks go by number, if I am informed right. No. 1 track is the first from the main line.

Q. On the east?

A. On the east. And then it runs to as far as No. 5, I think.

Q. East?

A. East of the main line, and then the blacksmith shop is between that and the next track, and then the car shop is the next on the east, and the next track, I suppose for mostly—we call it the blacksmith shop track, and I don't know what the number of it is, I am sure.

Q. Now, then, what is the total number of tracks on both sides of the main track, the east and west side?

A. Well, the tracks in what they call the switch-yard, I think there are five east of the main line, and two on the west.

The COURT: That would be seven besides the main track?

20 A. Yes, sir; seven besides the main track.

Mr. WHITE: About how far would those tracks be from each other—those tracks you have mentioned?

A. Well, I should judge there is about four feet between the cars when they are standing on these tracks.

Q. And how far apart are the whole seven tracks or eight?

A. Well, they may not be that near together all the way across.

Q. Now, on which track did you say the cars that you was repairing was?

A. I think it was on No. 1 track.

Q. Was there any cars on the other tracks belonging to this company?

A. I don't remember positively, though I think there were.

Q. Now, then, you can go right on from where you started—you say you and Mr. Pool was ordered by whom?

A. Joseph Starr.

Q. To do what?

A. To repair this car.

Q. Well, what was Mr. Starr's authority as to repairing cars? What cars and where were the cars that he had authority over to repair?

A. He has authority to repair all cars that come into the shop.

Q. And also cars that are repaired outside of the shop on the tracks?

21 A. Yes, sir; cars that are repaired outside of the shop.

Q. Now, you may go on from the point where you was. You say you was ordered by——

A. We was ordered by Mr. Starr to repair this car. It was a Miller hook car.

Q. Now, then, you were stating what you did—you with Mr. Pool?

A. Well, we took up what is called a carrying strap to carry the iron. It is a strap that goes underneath the Miller hook to hold it up; the one that had been on was off, had been lost off by some means or other, and we was to put another one on. We took the bolts off this strap to put up and went to repair this car so that it could go on the train that was leaving for the West. It was about their time to leave, as near as I can remember.

Q. About what time was that of the day?

A. Well, it would be very near quitting time. I don't remember exactly what time, but I think it would be very nearly quitting time.

Q. Quitting time would be about what time?

A. We usually quit there about five o'clock—that is Southern Pacific time. I should judge it would be about half past four. That is Southern Pacific time—San Francisco time.

Q. It would be about half past four in Ogden, would it?

Q. About half past five, local time.

Q. Go on and state——

22 A. Well, we were to repair that car. In order to repair this car we had to move it—uncouple it and remove it from the train. It was the last car on the train, and we had to move it from the train, or in order to get to work at it—in the position it was in—the Miller hook was binding against the draw-bar. The other car was tight and we could not move it. We could not get this strap up until we did move it.

Q. How did you move it?

A. By pushing the brace. We could push the brace and move it.

Q. Whom was present when it was moved and assisted in moving it?

A. There was me and Mr. Pool and Mr. George Rice, and I don't remember who else. Whether there was any more or not, I can't possibly say. To say who was present at that time, I could not.

Q. Was Mr. Kilpatrick and Mr. Taylor present and helped you move it?

A. I don't remember. After we had got these cars apart far enough from the draw-bar, in order that we could work on it, we went to work, and we heard the noise of the engine switching, the engine running, as I supposed, and I says to Joseph Pool, says I: I have an idea they are coming in here, and he was sitting with his back to the west rail inside between the two rails, and I was sitting on the east side and between the two rails. We was both inside the two rails. From his position he could lean back this way and could see the cars, see the engine
23 and caboose coming from the south to couple on. He says: Yes, they are coming in here. Well, says I, let's get out, and so he stepped to get out or made a move to get; I don't really think he got out entirely, but made a move to get out on the west side, and I stepped right out on the east side, and I saw they were coming. Mr. Rice was standing outside of the car and I says to him, says I: You go and stop him, and don't let them hit this car at all, and told him that it could not get out on the train until it was repaired. Of course they could not make up the train until that car was repaired, and says I: Don't let them hit the car at all, and we will have it done in five minutes. Says he, All right, and stepped down to the other end of the car, and I saw him signal for the engineer to stop, making the regular signal with his arm to them coming up.

Q. What did he say right there—what, if anything, did he say at that time?

A. He didn't say anything at that time—he stood and signaled. I was standing right at the end of the car still looking down and saw Mr. Pool leaning back over the rail this way—about in that position, looking back at the engine coming. They came up very slow within about six feet of the car that he was working under, and then came to a stop. I heard Mr. Rice tell somebody not to hit the car, that they were working there. As soon as I heard him say that I just went right to work and jumped right under the car again with Mr. Pool and he turned his attention right to the
24 work, and we went to work again. I felt a little uneasy my-

self, thinking they might try to couple the caboose unto the car that we were working under. They can do that very easily sometimes, you know, without moving it. So I leaned over the rail, I was kind of on my knees, and I turned my head and leaned over the rail to the east and looked right out and there I saw one of the yardmen giving a signal to back up. I could see the motion of his arm and part of his body, and says I look out, Joe, they are right in on us and threw myself head first out over the rail and the brake caught me on the thigh or hip rather, and the brake-beam on the forehead, and threw me off of the track and beyond the rail.

Q. What did Joe Pool do first when you told him?

A. I didn't look to see the movements that he made. I was looking for my own safety, though I had warned him. As soon as I struck ground I threw my head back this way and saw him just lying between two cars.

Q. Now, then, will you please state to the jury what his position was during that particular time?

A. Well, his position, he was sitting about in this shape, I think about like that with his back to the west rail—just about in that position, sitting, I think, on his left foot.

Q. What was your position at the time?

A. Well, when I leaned over the rail I was on my hands and knees, this way.

25 Q. Your head towards the outside?

A. My head towards the outside, looking south, towards the engine.

Q. State whether you could get away easier or not so easy as Mr. Pool.

A. Sir?

Q. State whether you could get away from the reach of the cars as easy or not so easy as Mr. Pool.

A. Well, I think I had the advantage. It was an advantage to get out then, I think.

Q. In what respect?

A. Simply because my hands was on the outside of the rail and part of my body and my feet inside the rail, and was in a position to jump very easy.

Q. How long or short a space of time was it, from the time that you started to get out before the cars came together?

A. Considerably less time than it takes to tell it. I can't tell you the exact length of time—it was very short, at any rate—and it came together with a tremendous force.

Q. How far, if at all, back did it drive this car that you were under?

Q. I think it drove it in the neighborhood of six or eight feet.

Q. Now, then, what did you next see as to Joseph S. Pool's position, if anything?

A. Well, the next thing I saw, after I had struck the ground, was seeing him between the two cars. He was standing right

26 straight up. The cars—the pressure of the cars had doubled him up somewhat, but he was standing about like this.

Q. Now, when you saw him, had he moved from his first position—the position he was in when he was repairing?

A. He had moved.

Q. From the position you were in when you heard the cars coming?

A. Yes, sir; he was standing—sitting upon his left foot, I think, when I saw him last. I made a jump myself, and, of course, I didn't see him, for I was jumping for my own safety, but as soon as I struck ground I looked up and saw him.

Q. The position he was in, when you heard the cars coming that last time, would be as he moved, what would be his move to get up and get out of the way?

A. Well, yes, I supposed he considered that his best move. I could not see where he could make any improvement on it.

Q. Now, how was he injured after you saw him—immediately after this accident?

A. Well, sir, what is called the safety hook, which stood out some distance from what is called the nose piece of the platform.

Q. That platform which held the platform, you mean?

A. Yes, sir; that platform that projected out some two or three inches, I think, and that caught him right in the stomach here and his back was against the other car—the box car on the
27 north—and his arm here, his left arm, I think, that was here on the draw-head, or what is called the deadwood or buffer of the Miller hook car, which slipped up over his arm, here, and cut the arm between the deadwood and this buffer.

Q. How far through him or into him did this bolt of the car go—the safety bolt?

A. Well, we took the car—the car was sent over to the shop the next day for repair, was not sent on the train, and we took a measurement of the distance of this from the nose piece to the platform of the other car—this Miller hook car. We measured the distance between the cars when they would be in the same position, and, I think, if I remember right, it was about three inches space that he had between this set and the car back of him.

Q. Do you remember what day of the month this was?

A. No, sir; I don't.

Q. Whether it was the 12th or 13th?

A. I don't remember the day.

Q. Do you know how soon after that he died?

A. If I remember right, it was the next day.

Q. Well, how did he appear after he got away from the track?

A. When he got away—nobody else got him away from the track——

Q. Well, state at the time that he was taken from between the cars.

Mr. MARSHALL: We object, if your honor please; we don't
28 think it is material. We object to it as immaterial and irrelevant, and I would like to have a ruling one way or the other.

The COURT: What is it offered for?

Mr. WHITE: Well, sir, why it is offered to show that his injury is what killed him.

Mr. MARSHALL: I admit that he died, your honor, from his injury, and the question now is, whether we are to blame for his injury; that is the point.

The COURT: If that is all it is offered for, it is a sufficient admission.

Q. Do you know who is the engineer on that train?

A. Mr. Weaver.

Q. Who was the fireman.

A. Mr. Purdy.

Q. Now, how many cars were there connected with the engine between the car where he was repairing and the engine?

A. I think there were two—the caboose and a car, if I remember right. I would not be positive as to the number of cars they had.

Q. Who did you see out at that time or about that time—out at the switch, using the switch, if anybody?

A. I think it was Ben. Kilpatrick.

Q. Anybody else there?

A. William Taylor was in the neighborhood.

Q. Was Ben. Kilpatrick acting as one of the switchmen at that time?

A. Yes, sir.

29 Q. Do you know how long he had been working as a switchman in the yard?

A. I do not.

Q. How long after that did he act as switchman?

A. I think he was switchman in the yard for a week. Somewheres in the neighborhood of a week or a month; I could not say for a week or two, but I know he was changed onto the road after that.

Q. Now, which side of the cars was it that this switch and switchman was standing at this time?

A. Well, the No. 1 track branch from the main line towards the east and run north. It comes on the east of the main line.

Q. Where was the switch?

A. At the south end of No. 1 track; that would be south of the train.

Q. South of the train——

A. Yes, sir; south of the car that he was working on.

Q. Was it either east or west of the train?

A. It was a little east that was, the engine was west and south from the car that he was working on.

Q. About how far then, would the switch and switchman be from where he was—about how many feet or rods?

A. I should judge it would be about 100 yards.

30 Cross-examination.

By Mr. MARSHALL:

Q. Mr. Fowers, how long did you and Mr. Pool think it would take you to finish those repairs on that car?

A. About five minutes.

Q. About five minutes?

A. Well, over five minutes.

Q. I understand you to say it was a small strap that was lost?

A. That was a strap that had to be put up. It had to be fastened, and, I think, two bolts to put on.

Q. And you supposed it would take you only five or ten minutes?

A. Yes, sir.

Q. Mr. Fowers, was it customary, or infrequently, the case to make these repairs on the switches on trains when such small repairs had to be made?

A. Yes, sir.

Q. And it was your business to go out and repair them?

A. Yes, sir.

Q. Mr. Fowers, when you and Mr. Pool went into that yard to repair, you knew that trains were being moved backward and forward, didn't you?

A. Yes, sir.

Q. Did you tell those switchmen—did you advise those switchmen to notify the engineer you were in there?

31 A. No, sir; I told Mr. Rice to tell this switchman that we were in there repairing a car?

Q. And you relied on the switchman to attend to notifying the engineer, didn't you?

A. Yes, sir.

Q. You expected him to notify the engineer?

A. Yes, sir.

Q. To protect you; and you both—Mr. Pool was in the same condition or position; did he expect that, too?

A. Sir?

Q. Mr. Pool and yourself both relied on the switchman to notify the engineer?

A. Yes, sir.

Q. And you thought this switchman would attend to it?

A. Yes, sir.

Q. That he would notify them—could the engineer see you from where he was, out on the engine? Could he see you were in there with the caboose and car between you?

A. No, sir.

Q. And he didn't know whether you were in there or not?

A. I don't know whether he did or not.

Q. You don't know whether he did or not—you didn't hear anybody tell him that you were under there?

A. No, sir.

Q. It is to be presumed that you were there?

Mr. WHITE: I object to that.

32 The COURT: That is incompetent.

Q. Mr. Fowers, couldn't you have—couldn't you and Mr. Pool have put a red flag out there, that would have notified—put up a red flag or some other flag that would have notified the engineer of danger?

A. Yes, sir.

Q. Why didn't you put up a flag?

A. Because it was too big a work.

Q. Because it was too much work?

A. Yes, sir.

Q. You thought it would take only a few minutes before you got through?

A. Yes, sir. We also knew that we had a man stationed there to watch for us, and considered ourselves safe.

Q. Who was the man you had stationed there to watch for you?

A. Mr. Rice—Mr. George Rice.

Q. And you considered you were all right with Mr. Rice to watch for you?

A. Yes, sir.

Q. Who was Mr. Rice?

A. He was a car laborer from the shop.

Q. Was he one of your car-repairers?

A. Yes, sir.

Q. Did he work that morning?

A. He worked in the car shop generally, more frequently.

Q. What did he go out there for?

33 A. Him and Mr. Hyrum Jenkins was expected to adjust the air on that train.

Q. Yes, sir; and you requested him to notify the engineer?

A. Yes, sir. Understand, of course, that they could not use the air on that train until we had done these repairs, because they could not make the coupling with the rest; they was waiting for these repairs.

Q. Sir?

A. They was waiting for these repairs.

Q. While he was standing there you just requested him to notify the engineer not to back back?

A. Not the engineer, but the switchman.

Q. Not the engineer, but the switchman, not to back back the engine?

A. Yes, sir.

Q. You didn't know whether he notified them or not?

A. I heard him tell them not to hit the car, and that was satisfactory to me.

Q. You supposed it would not be struck?

A. I supposed it would not be struck; yes, sir.

Q. Did you see the switchman, yourself?

A. I saw one of them—a part of one of them—I could see his arm and part of his body.

Q. Well, was it the switchman that Mr. Rice spoke to that beckoned the engine to back back?

34 A. Yes, sir; I heard Mr. Rice talking to that switchman, and I suppose it was that switchman.

Q. Well, what switchman was that; who was it?

A. I think it was Ben. Kilpatrick; I would not be positive which one it was.

Q. But you think it was Ben. Kilpatrick who signaled the engineer to back back?

A. Yes, sir.

Q. And struck this car?

A. Yes, sir.

Q. And he did that after he had been warned by Mr. Rice?

A. Well, I suppose——

Q. Well, after you heard Mr. Rice tell him——

A. Yes, sir.

Q. He done that after he had been told by Mr. Rice not to hit the car?

A. Yes, sir.

Q. Who, then, signaled the engineer not to back back?

A. Yes, sir.

Q. It was the switchman?

A. It was the switchman; yes, sir.

Q. Was that the same thing as a brakeman?

A. Yes, sir; sometimes they call them yardmen and sometimes brakemen and sometimes switchmen; but as a general rule they call them yardmen.

Q. Just ordinary brakemen?

A. Yes, sir; does switching in the yard.

35 Q. Mr. Fowers, when you first spoke in your examination-in-chief you stated that when you heard the engine that you were leaning back and looking out and saw the engine, and then spoke to Pool and told him: "Pool, they are coming," or words to that effect; or, "Pool, I believe they are coming on this track," what was it you stated Pool's reply was?

A. Well, I think he said "Go and stop them," or, "Tell Mr. Rice to stop them."

Q. Well, now, when you first spoke to him, didn't he say they were coming very slow? I understood you to say there was no danger, and that a man could get out easy enough?

A. It might have been something to that effect.

Q. And you at that time got out and stood on the side looking towards the engine, did you not?

A. Yes, sir.

Q. How far was the engine from the train?

A. I should judge it would be fifty yards at least.

Q. How far from the rear end of the cars next to you?

A. From the rear end of the cars next to us, in the neighborhood of fifty yards.

Q. You didn't make any signal, then, to the engineer yourself?

A. No, sir.

Q. Made no warning at all?

A. No, sir.

36 Q. That you were under there at all?

A. No, sir.

Q. I think you got back under the car, as I understand you, and commenced to fix this bolt?

A. Not until they come to a stop.

Q. Not until they come to a stop?

A. Yes, sir.

Q. Well, after they came to a stop, did you know that there was any signal, and who was it made the signal to back back farther?

A. At the time that I saw the signal I was under the car, but leaning out over the rail, and I saw the signal for to back up; that was after they had stopped, and after I had got under the car again, and at that time I leaned over and saw, I think it was Kilpatrick, giving a signal to back up.

Q. You saw Kilpatrick give a signal to back up, and immediately after that signal they backed up and you sprung out.

A. Yes, sir.

Q. And that is the time that Pool was caught?

A. Yes, sir.

Q. Mr. Fowers, did Mr. Pool lean back himself when you told him the cars were coming, you thought, on that track, and look out towards the engine?

A. Yes, sir.

Q. And then make the remark to you: "That it is coming so slow we can easily get out"?

A. Yes, sir; something to that effect.

37 Q. Well, he saw the engine coming, too, did he not, at that time?

A. Yes, sir.

Q. Could he see the switchman, Rice, or the brakeman, at the time he was leaning over the rail, looking out?

A. Yes, sir; I think there was one of the switchmen on the west side.

Q. You think one of the switchmen was on the west side, where Pool was working?

A. Yes, sir.

Q. Well, was that Kilpatrick or was it Rice?

A. No; Mr. Rice was on the east side.

Q. Rice was on the east side and Kilpatrick was on the west side?

A. No, sir; I saw Kilpatrick.

Q. I understand Kilpatrick was on the west side?

A. No; I think he was on the east side; I think it was Taylor on the west side.

Q. You think it was Taylor on the west side?

A. I think so.

Q. Well, Pool could see Taylor, or could see the switchman on the west side?

A. Just then I think Taylor was a switchman.

Q. And he could see Taylor?

A. Yes, sir.

Q. How close was Taylor to him, do you know?

A. Well, I suppose a little over the length of a car from him.

38 Q. Well, did Mr. Pool make any remark to Taylor, the switchman, about his being in there?

A. I don't remember hearing him.

Q. You don't know whether he said anything at all or not? Did Pool lean back to see the engine at all after that; do you know whether he was observing the engine at that time?

A. At the time that I had got under the car they had come to a stop; I was just straightening myself from the leaning position.

Q. From the leaning position, from looking at the engine?

A. Yes, sir.

Q. Did either of you or——

The COURT: He didn't look out, then, to see the engine after they came to a stop?

A. No, sir; he did not.

Q. Well, now, in the position that Mr. Pool was in, on the west side of the car, could he see the engine and the cars attached to it better than you could?

A. Yes, sir.

Q. It was more fully in view to him than it was to you?

A. Yes, sir; I had to get outside of the rail, outside of the track nearly to see them.

Q. That was owing to the curve in the track?

A. Yes, sir; and Mr. Pool could see them by simply leaning over.

Q. Merely leaning back?

A. Leaning back over the rail.

39 Q. Try and explain to the jury, there, Mr. Fowers, precisely as near as you can with the sketch that is made, and let the jury see the position of the cars and the side track; just explain to the jury the side track, the way it was.

A. This is all right; this is near enough. This line that you see running here is the main line, called the main line; this is the south end and this is the north. Now, this track here is what is called the caboose track; that is where they put the cabooses that are not in use; and this track here is called No. 1 track, running about that, in that position from the main line. Now, we were stationed somewhere about in this neighborhood on No. 1 track, where the car was, and this is where they got the caboose from to put on to this train, and they were coming from this switch, here; there is two switches there, one leading them on to the caboose and another on to No. 1 track, from the main line. They were coming over that switch when I heard the noise, going out on the east side of their cars—that is the position. We was here. Mr. Poole was on the west side between the rails, and I was on the east side.

Mr. WHITE: Is that north and south now?

A. Well, this is running north, you know.

Mr. WHITE: Is that north there?

A. No; that is the north end here, out this way.

Mr. WHITE: Then that would be turned around.

40 A. This is the main No. 1 track, branches from the main line and runs north along the main line.

Redirect examination.

By Mr. WHITE:

Q. Who was it at the switch on that occasion, this No. 1 track at the outer end?

A. I think it was Kilpatrick.

Mr. MARSHALL: Where was Kilpatrick at—was he on the east or west side of the track?

A. Well, I could not be positive now, the position that they were in that far away, because I didn't pay quite enough attention to it. They were both with the cars.

Mr. MARSHALL: What both do you speak of?

A. William Taylor and Kilpatrick.

Mr. ALLISON: Was that position that Mr. Pool took necessary in order to repair that car?

A. Well, it was about as good a position as he could get.

Q. Now, what was defective—what was the particular defect about that car—where was it?

A. It was this carry strap, underneath the Miller hook. It holds the Miller hook to its place.

Q. Do you think you had to go underneath to fix it?

41 A. Yes, sir. He being between the rails, the strap was put right up against this snubbing block; it is quite a block, about six inches wide, and some being about two feet in length, that goes next to the buffer, underneath, to drive this trap around between the bars, bolted on underneath the strap with nuts.

Q. Now, what strap do you refer to, you don't mean a leather strap—an iron strap?

A. An iron strap.

Q. His back was to the west?

A. His back was to the west.

Q. And yours to the east?

A. Yes, sir; when I first got under.

Q. Now I understand it was when you were both in that position that you heard the car coming; is that the fact?

A. No, I didn't hear anything, but I looked back and leaned over the rail looking out, and then saw the signal.

Q. Well, this is when you heard the engine—when did you first hear the engine coming?

Mr. MARSHALL: Well, you are going over the same matter.

The COURT: He testified before that a little while before he had heard the engine running up there, in that direction.

Mr. ALLISON: I didn't understand him very distinctly.

The COURT: Well, if there is any misunderstanding——

42 A. When I heard the engine and saw it was coming from the switch on No. 1 track, they had come to a standstill—come within about six feet of the car where we were working under; and

after it came to a standstill I didn't hear it till I looked over the rail and saw the signal given.

Q. I understand you to say before that you were facing east; immediately before the accident you were facing east?

A. Yes, sir.

Q. And his face was east?

A. Yes, sir.

Mr. WHITE: One would be facing inside and the other outside. Who was this man Kilpatrick; how long had he been working there?

A. I could not tell you.

Q. How long had you known him?

A. Well, I was not personally acquainted with him, then. I just merely knew him by sight.

Q. You say he was a switchman?

A. Yes, sir.

Q. What were his duties as switchman?

Mr. MARSHALL: Really, I would like to know the purpose of this examination; whether it is to show negligence on the part of the company or incompetency of the gentleman?

Mr. WHITE: No; it is not. It is not for the purpose of showing his incompetency; for showing what his duties were.

The COURT: Go on.

Q. What are the duties of switchmen?

43 A. Well, it is to make up trains in the yard, and trains coming in to be switched, and they deliver cars where they are supposed to go; some, very likely, to the freight-house, some to the Union Pacific, and some to the coal yard; some one place and some another.

Q. As a rule, this is not confined immediately around the repair shops?

A. Oh, no.

Q. All over the yard?

A. Yes, sir.

Q. Now, what becomes of the conductor on a train when it reaches the yard there?

A. They leave the trains, I think.

Q. Well to whose custody?

A. To the custody of the yardmen.

Q. And among the yardmen you include the switchmen?

A. Yes, sir; that is the switchmen.

Q. The engineer and firemen, then, are they subject to the signals and orders of the switchmen?

A. I think they are.

Q. What are the duties of a car-repairer?

A. To repair all cars that he is called upon to repair, subject to the foreman's orders.

Q. To do what?

A. Subject to the foreman's orders.

Q. The foreman of the repair shops?

A. Yes, sir.
Q. Are switchmen subject to his orders?
A. No, sir; I think not.
44 Q. This man Taylor that you spoke of, how long had he been there, if you know?
A. I don't know how long he had been there.
Q. Had he been there as long as you had?
A. I don't remember.
Q. You don't know how long Kilpatrick had been there?
A. No, sir; I don't.
Q. Was Rice on that day directed by Starr to assist in repairing this car?
A. No, sir.
Q. He was a car-repairer?
A. He was a car-repairer.
Q. Do you know what Rice was out for?
A. Yes, sir; for the purpose of testing the air on that train.
Q. Rice and Jenkins were out testing the air under the cars?
A. Yes, sir.
Q. Where were you when you saw Rice communicate, do you know, to Kilpatrick?
A. I was standing at the north end of this car.
Q. Standing there?
A. Yes, sir.
Q. Where was Kilpatrick, on which side of the train?
A. He was right in front of the caboose, I think.
Q. Where was that caboose from where you were?
45 A. Well, it might have been twenty feet at that time.
Q. Twenty feet away.

Mr. MARSHALL: If your honor please, I think they have gone all over this.

The COURT: He testified in relation to those distances. He said that that caboose stood out there something like twenty feet, and this brakeman or switchman, whatever you call him, was on the other side.

Mr. ALLISON: My recollection is, it is not in the record.

Mr. MARSHALL: I will withdraw the objection.

The COURT: Go on and ask the question.

Mr. ALLISON: I understand you to say it was about twenty feet to where Kilpatrick was?
A. Yes, sir; when Mr. Rice spoke to him.
Q. Did you see Kilpatrick when he spoke to him?
A. Yes, sir.
Q. Were you so you could see him?
A. Yes, sir.
Q. Well, did he hear him—are you able to say that he heard him?
A. Well, I heard Mr. Kilpatrick make some reply, but I don't know what it was.
Q. He replied, did he, when Rice spoke?

A. Yes, sir.

Q. This was the time the engine was standing still?

46 A. No, sir; she was moving then, and came up within about six feet and then stopped. She was stopped at the time——

Q. I know, but after Rice spoke to Kilpatrick the engineer stopped the engine?

A. Yes, sir.

Q. Was that in response to signal from Kilpatrick?

A. Yes, sir; it must have been.

Q. What did Kilpatrick say when he communicated to Kilpatrick; did he refer to your being under the car?

A. I would not be right positive as to that. He told him not to hit the car, and I think he said we were working there.

Q. Now, in answer to Mr. Marshall, you said that Mr. Pool was on the west side of the car, the car moving here this way, from the east?

A. Yes, sir.

Q. So that Mr. Pool could throw his head about and see Mr. Taylor on the west; could Mr. Taylor see him?

A. I could not tell you, I am sure.

Q. If Pool could see Taylor, Taylor could see Pool. He was in about the same position that Kilpatrick was?

A. Yes, sir; I think so. I did not see him, but I think—I suppose he would be.

47 Recross-examination.

By Mr. MARSHALL:

Q. Mr. Fowers, the switchmen's business is to move switches, is it not, for the engineer to push his engine across?

A. Yes, sir.

Q. And also to couple cars?

A. Yes, sir.

Q. And he acts as brakeman on the train?

A. Yes, sir.

Q. And he assists the engineer in coupling to make up trains; that is, he makes signals to them how close the cars are together, does he not?

A. I think they do.

Q. And he couples cars?

A. Yes, sir.

Q. Isn't that the duty of an ordinary common brakeman, to signal to the engineer when to stop and when to move?

A. Yes, sir; if I am informed right the engineer is subject to the brakeman's orders.

Q. And he signals the engineer?

A. Yes, sir.

Q. As to when to move and when not to move?

A. Yes, sir.

Q. The brakeman is himself not a superior employee to the engineer?

A. Not any way that I know of.

48 Q. He is there to assist the engineer how to back, and when to move?

A. Yes, sir.

Q. The switchman, then, is a brakeman, employed in the yard to assist in making up trains?

A. Yes, sir.

Q. And to make signals?

A. Yes, sir.

GEORGE C. RICE, sworn for the plaintiff, and examined by Mr. WHITE, testified as follows:

Q. Mr. Rice, where do you reside now?

A. In Ogden City.

Q. How long have you resided here?

A. About fifteen years.

Q. Have you ever been at work for the Southern Pacific Company?

A. Yes, sir.

Q. How recently have you worked there?

A. I was employed in the fore part of 1888 and the latter part of 1887.

Q. Where were you September—about September 12th or 13th, 1888?

A. It must be in the C. P. car shops.

Q. What was your business there?

A. Car-repairer.

Q. Who was your foreman?

A. Mr. Joseph Starr.

49 Q. Did you know Joseph S. Pool in his lifetime?

A. I met Mr. Pool in the shops September or August, 1887. Simply acquainted with him; worked there a month or six weeks in a rush, when Mr. Sherbon put me on for awhile, and later I went back and saw him again there and became a little more acquainted with Mr. Pool.

Q. Did you see Mr. Pool about the 12th or 13th of September, 1888, at the time when this accident occurred?

A. Well, the accident—I got the impression on my mind the accident occurred on the 26th of September.

The COURT: No matter about the time.

Q. The day of the accident, did you see him there?

A. Yes, sir.

Q. Did you see him repairing cars?

A. Yes, sir.

Q. Who else was repairing the car at the time?

A. Mr. Frank Fowers.

Q. What was his business?

A. Car-repairer.

Q. And your business was what?

A. Car-repairer.

Q. Who were the parties that were at that time repairing that particular car?

A. Well, at that time, Mr. Frank Fowers and Mr. Joseph Pool.

50 Q. Who ordered them there?

A. Mr. Starr, I presume. I was not in the shop at that time.

Q. No matter. Now, then, you saw them go there; did you go there at the same time?

A. No, sir; not at the same time. I followed them soon after.

Q. Now, then, did you see them at the place repairing before the accident?

A. Yes, sir; a short time before.

Q. Well, what, if anything, were you asked to do by Fowers and Pool at that time?

A. Well, after we had got our hose coupled onto the air pipes on the main train, they asked me if I would not come and hold—help to hold the Miller hook up so that they could carry the iron on. In the meantime, by some accident or some cause, the thread of the bolts had got battered or damaged to some extent so as the nut would not go on. After they had got done—I think Fowers was under the Miller hook holding it up on top of his shoulders, on his hands and knees, and Mr. Pool was at the back trying to get the nut on, but he could not get it down in order to get it done, so he let it down to the ground and picked the carrying iron up, and then run the end up, and the bolt always matches it so as to go on easily, and then he turned to put the nuts on again, but he could not without a monkey-wrench. The carrying iron had one bolt off on one side.

Q. Did you see Kilpatrick at that time?

51 A. Not until the switchman came down with the caboose.

Q. What was he doing when you saw him?

A. Mr. Kilpatrick was riding on the steps on the fore part of the caboose, I think.

Q. Well, later on, what was he doing about the switch, if anything?

A. Well, I didn't see him at the switch.

Q. Well, did you have any conversation with Mr. Kilpatrick or Mr. Taylor in relation to those parties under the car?

Mr. MARSHALL: You had better ask him what conversation, if any, he had. We object to the form of this question.

The COURT: It is leading.

Q. What, if any, conversation did you have with Mr. Kilpatrick?

A. I had no conversation with Mr. Taylor, if that is his name I don't know him. There was two switchmen, I didn't know the names. I had no conversation with Mr. Taylor. I had had no conversation any further than to tell Mr. Kilpatrick not to come up to touch the cars, there were men working under the car.

Q. How far was he from you at that time?

A. Well, it was twenty or thirty feet at the time I told him this.

Q. Where was he at that time?

A. He was on the west of the caboose.

Q. Where were those switchmen?

52 A. Well, the engine had just got the cars switched—well, a little farther.

Q. Now, then, you told him that; what did you see, if anything, him do?

A. Well, I saw him do nothing more until the engine and caboose stopped within six feet of this freight car that they were working on, when it stopped still; the next signal was Mr. Kilpatrick gave a motion.

Q. What was that?

A. For it to come back, and it came back with great force; and at that time I heard Mr. Fowers holler "Pull up!" I run back to where Mr. Fowers was. He was at the other end of the car where he was at work previous to my going up and notifying him not to come down; and I saw Mr. Pool in between the cars, and we yelled for help, and seeing that the engine pulled up, I had an idea that it was still coupled on the caboose, until they pulled up. It was some twelve or fourteen feet away from the caboose when I heard the fireman holler out that it was not coupled on.

Q. Now, how long after you told Mr. Kilpatrick there were men under the cars was it that you saw Mr. Kilpatrick go and make the signal?

A. How?

Q. How long after you told Mr. Kilpatrick that there were men under the car?

A. How long after that; oh, it was very short.

53 Q. And then, what if anything, did the engineer, on the car, on the engine that he was working, do in response to that signal; what did the engineer do with his engine in response to that?

A. Why, he backed up.

Q. How did he back up?

A. He came back with great force to this car.

Mr. MARSHALL: We object to that as immaterial and irrelevant.

The COURT: The manner in which he came back?

Mr. MARSHALL: Yes, sir, the manner in which he came back; it is immaterial, irrelevant and incompetent here. Argues.

The COURT: That may be true, Mr. Marshall, as to whether it was the fault of the engineer or the brakeman. The charge is that it is the fault of the defendant; so that if they succeed in showing it was the fault of the defendant, who was then in charge, it would be proper to show; to show what chance they had of getting out.

Mr. MARSHALL: We will take an exception.

Q. What was Mr. Hyrum Jenkins doing?

A. He was down at the north end of the train, waiting for me to give him the signal that I had the air turned off, so as he could set

up his brakes and release them again. He was away off, some eighteen or twenty cars from us.

Q. Well, what place was he to work for the company?

54 A. He was employed in the car shops, repairing cars.

Q. Did he, or not, have anything to do with the switching or switch-yard?—yard master?

A. Not at that time he didn't.

Q. To whose orders were you, Fowers, and Pool subject to?

A. Mr. Starr.

Q. Did you, or not, know the position of Fowers and Pool at the time, or before you gave the signal, when you saw them there?

A. I think Mr. Pool was sitting down, with his legs crossed and sitting on his feet, while Mr. Fowers, I believe, was on his hands and knees; on his knees in some shape; I don't remember just exactly.

Q. Do you know whether Mr. Pool was facing the outside of the track—that would be the west side—or whether he was facing inside?

A. Inside the track; could not do any other way.

Q. Could not do any other way?

A. Not and do his work.

Q. Now, which way was Fowers facing?

A. Fowers was facing Mr. Pool until the noise of the train drawed his attention, and the next thing I saw was Mr. Fowers standing on his feet at the back of me.

Q. Well, just at the time—did you see them just before the accident occurred, before the noise could be heard; before the

55 engine came up the last time; did you see Fowers and Pool after they stopped still?

A. No, sir; no, sir; not until I heard Mr. Fowers holler "Pull up." When I turned around I went down to where Mr. Fowers was, and there I saw Mr. Pool between the cars.

Q. Did you see Taylor there anywhere?

A. No, sir; I don't remember seeing Taylor at all.

Q. Who was managing the track, the switch-track on this particular track No. 1, it is called, where this car was being repaired?

A. Well, I don't know who had anything to do with the switch. I don't think——

Q. Was Kilpatrick a switchman at that time?

A. Well, I don't know what he was employed for. I was not hardly acquainted with Mr. Kilpatrick; just met him occasionally. I knew he was an employee of the road, but what——

Q. Was he at that particular time acting in the capacity of switchman, so far as you could see?

A. Yes, sir.

Q. What are the duties of switchmen in the yard?

A. I don't know.

Q. What pay were you getting as a car-repairer there?

A. $2.50 a day.

Q. $2.50; do you know whether Pool was getting the same, or more or less?

A. No, sir; I don't know.

56 Q. What kind of business, with reference to you, was he doing; the same?

A. Mr. Pool was employed as a laborer, while I was employed as a carpenter.

Q. He may have got less than you did?

A. He may have; I don't know.

Cross-examination.

By Mr. MARSHALL:

Q. Where was this strap, Mr. Rice, as to the front part of the car or the rear part of the car, that was being repaired?

A. Where was the strap?

Q. Yes?

A. Well, the strap is underneath the platform, just about level with the main front of the car.

Q. It is then really in front, outside of the wheels?

A. Yes, sir; it is outside of the wheels.

Q. And not under the car?

A. Not under the car; under the platform.

Q. Under the platform?

A. Yes, sir.

Q. Well, does that necessarily throw a man between the—where the trains are close together, does it necessarily throw a man between the cars?

A. Yes, sir. They have to raise it up—raise it up between the cars.

57 Q. Well, just describe to the court the position that the man was sitting in.

A. I don't remember how Mr. Pool was sitting, in fact, if I ever noticed it at all; but it would be very difficult for a man to get up off his feet—out of this position while he was facing the middle of the car; it would be difficult for him to turn round and get out from the track without first rising on his feet.

Q. That would be between the cars?

A. Yes, sir.

Mr. ALLISON: He would have to keel a back somersault, wouldn't he?

A. No, sir; not that I know of.

A. C. FELL, sworn for the plaintiff, and examined by Mr. MARSHALL, testified as follows:

Q. You reside in this town, Mr. Fell?

A. I do.

Q. What position, if any, with respect to the Southern Pacific Railway Company, did you occupy two years ago?

A. I was, two years ago, superintendent of division.

Q. At what time did you cease to be superintendent?

A. Two years ago; nearly two years ago.

Q. How long previous to that time had you been superintendent?

58 A. How long prior to that time?

Q. Yes, sir.

A. Nine years.

Q. Nine years, and was stationed at Ogden?

A. Stationed at Ogden.

Q. Called the Salt Lake division?

A. The Salt Lake division.

Q. How long had you been in the railroad business prior to your removal?

A. About twenty-three years.

Q. About twenty-three years?

A. About twenty-three years.

Q. How long in the employ of the Southern Pacific?

A. Well, nearly twenty years, Southern and Central.

Q. Nearly twenty years on the Southern and Central. Now, then, are you acquainted with the duties of yard masters at the Southern Pacific railway?

A. Yes, sir; I am.

Q. Were you acquainted with the switchmen's duties in September, 1888, or previous to that time?

A. Yes, sir.

Q. Are you acquainted with the duties of car-repairers of that company?

A. Yes, sir.

Q. What were the duties of car-repairers two years ago, now?

A. Well, the duties—of course, what the duties are now—two years ago?

59 Q. The duties of car-repairers two years ago?

A. Of course the duties were to repair any cars that might need repairs, speaking in a general way.

Q. Who was this car-repair shop down here owned by, what is called the Southern Pacific car-repair shops?

A. That is owned by the Southern Pacific Company.

Q. And for whom did they do repairs?

A. Well, they did repairs for the Southern Pacific Company, also repair any other foreign cars that were damaged on their road.

Q. Now, then, who are the officers of this repair shop?

A. At the time I was there, Mr. Sherbon was in charge of the repairs.

Q. What is that office called?

A. He was the foreman of the car-repairers.

Q. The office of foreman of car repairs?

A. Yes, sir; he had charge of all repairs at that time on the Salt Lake division; he was at the head of the department.

Q. Isn't there another officer under him there?

A. Yes; he has an assistant.

Q. Has Mr. Sherbon been promoted?

A. Since I left there?

Q. Is there an office of master mechanic and also foreman—was there at the time you were there?

60 A. There never has been the office of master mechanic, properly speaking, at Ogden; there is a foreman of the round-house and the foreman of car repairs.

Q. Now, then, are those different offices, this round-house and car-repair shop?

A. I understand they are today, but at one time Mr. Sherbon used to have charge of both.

Q. Now, then, under whom is the foreman of the repair shop?

A. Of the car-repairers?

Q. Yes.

A. Well, he is under what is called the car department; the master car-builder, it was at that time.

Q. Well, that is the first; now, next over that?

A. Next, car-builder, and then the general officers at San Francisco.

Q. The general officers at San Francisco; what relation does the foreman of the car-repair shop have to the superintendent of the Salt Lake division; is he under him?

A. The superintendent has, or had at that time, general supervision of all branches of business on the division.

Q. Under whose orders were the car-repairers subject to?

A. Well, they are subject to the foreman.

Q. Immediately, I mean?

A. Immediately, subject to the orders of the foreman of the car repairs.

61 Q. Now, then, there is another department there, called the yard or switch men; is that the same, or separate and distinct from the car-repair department?

A. The switchmen work directly under the supervision of the superintendent.

Q. That is Mr. Knapp?

A. Well, I presume it is the same now; it was when I was there.

Q. Then, had the switchmen or yard masters anything to do with the car-repairers or foreman?

A. You mean in the way of authority?

Q. Yes.

A. Never have done at that time.

Q. What are the duties of yardmen and switchmen in switching?

A. Well, their duties are to make up trains, place cars to be loaded and unloaded; weigh cars, and various other things that comes under the head of switching.

Q. What becomes of the conductor when the freight or caboose car train comes in?

A. When the train comes in the yard?

Q. Yes.

A. Well, when the train arrives of course it is under direction of the yard master. The conductor turns his bills of lading over to the agent, and of course the yard master takes charge of the cars.

Q. Who controls the movements of the trains in the yard?

A. The yard master.

62 Q. What do you mean by yard master and switchmen?

A. I mean there is one person who is designated as the yard master, and several others—as many as are required—are switchmen, under the supervision—directly under the supervision of the yard master.

Q. Now, then, the engines that are around to make up the trains—the engineers, under whose direction are they after that time?

A. If they are cars off the turn-table they are under the direction of the yard master.

Q. Who signals the engineer to move the engine and cars?

A. Usually the yard master and his assistants; the yard masters and switchmen; occasionally the conductors and brakemen have some time, but when they are doing that they are really assistants to the yard, or to the force in the yard.

Q. What was the custom there, with reference to repairing cars on the tracks themselves, when they were slightly out of repair?

A. Well, as a rule, cars were placed on certain tracks designated as repair tracks. A great many, of course, were repaired in the shops; there were several tracks running through the shop there, and as a rule, the cars requiring repairs were put on the repair tracks and in the shop.

Q. Were they repaired any place where they happened to be if the damage to the car was not large?

63 A. Well, yes; they had a place where the repairs were not sufficient to justify or require putting them on the repair track or in the shop. It might only need a bolt or something of that kind and it would take but a very few minutes; it would be done quicker than the car can be removed.

Cross-examination.

By Mr. MARSHALL:

Q. Mr. Fell, brakemen and switchmen are all under the supervision of the yard master, are they not?

A. Well, brakemen are to the extent when they are in the yard.

Q. Inside the yard?

A. Inside the yard, yes, sir; working within the limits of the yard.

Q. They are inferior and do the general work of making up trains—switching trains?

A. Yes, they are subject to the orders of the yard master in the yard.

Q. And in signaling the engineers, they are the assistants to the engineers in moving his engine backward and forward, and signaling him; showing how near they are to trains?

A. Yes, sir; you can hardly say assistants.

Q. They virtually move the engine—that is done by signal. They are the eyes for the engineer; they are the eyes in that way?

64 A. Well, the engineer is supposed to have eyes himself?

Q. Yes, both ways. Where he can't see the brakeman sees for him?

A. That is the rule.

Q. Well, ain't it impossible for them both to see always, and the eyes of the brakeman acts for him?

A. Yes, sir.

Redirect examination.

By Mr. ALLISON:

Q. I understand you that the engineer relies upon the switchmen and brakemen for signal?

A. Well, of course the signal is given by the brakeman or switchman.

Q. And the engineers rely upon it, is that it?

A. Well, not absolutely, of course. For instance, now, there is an open switch and the switchmen are giving a signal to come ahead, and the engineer saw the switch was open and, by obeying the signal, he would go off the track, and would not by failing to obey that signal; that's why I say engineers are supposed to have eyes.

The COURT: Mr. Fell, what I apprehend Mr. Marshall was asking about was, now, you say trains are under the management and control of the yard master when they are in there?

A. Yes, sir; while in the yard.

65 Q. Yes, while in the yard and past the turn-table, as you call it; then they are expected—the engineer is expected to move the train as he is directed by the yard master?

A. Yes, sir.

Q. Now, is it the theory, and what is the fact about that; that is, when the engineer sees a signal, given him by a brakeman, who has a right to operate the cars, is it the theory that he obeys that upon the idea that it is the orders of the yard master?

A. Yes, sir; that is, upon the theory that it is the orders of the yard master?

Q. Or is it the other way around, and the brakeman is simply doing that at the direction of the engineer?

A. No, sir, it is really done at the direction of the yard master; the yard master, or his assistants, acting for him. If the brakemen are assisting in doing any of the yard work they are subject to the orders of the yard master, and they are hardly switchmen in that capacity either.

Mr. ALLISON: When you use the term "brakemen" you mean switchmen in the yard?

A. Well, virtually, they are switchmen—it is a general term.

Mr. MARSHALL: The same term applies—the same term applies to brakemen as well as to switchmen?

66 A. Of course, they are the same. A great many points where there are no yardmen, then the brakemen do the switching, but when they arrive at a place where there is a

yard master and switchmen, if they do any work there of course it is under the supervision really of the yard master.

Q. Well, those switchmen are merely under the supervision of the yard master, are they not, in handling trains?

A. Of course; they are in the employ of the railroad company.

Q. They are subordinate to the yard master?

A. Yes, sir; direct.

Q. And like any other workmen in the yard—the engineer and the firemen, brakemen and switchmen—all those men engaged in handling those cars, are all subordinate to the yard master, are they not?

A. Yes, as a rule, they are; of course, there are some exceptions.

The foregoing is all the evidence offered in this cause.

Mr. MARSHALL: The defendant now moves the court to grant a nonsuit in this case:

First, because no negligence has been shown on the part of the defendant.

Second, that the evidence shows contributory negligence on the part of the deceased.

The court overruled the motion for nonsuit and the defendant duly excepted.

Court adjourned until Friday morning, April 4, 1890.

67 Defendant rested on its motion for a nonsuit herein.

Charge to the Jury.

GENTLEMEN OF THE JURY: This is an action brought by Malola Pool, as administratrix of the estate of her deceased husband, to recover for what she claims she has been damaged by the carelessness and negligence of the defendant, by which her husband lost his life.

The claim on the part of the plaintiff is that the deceased, the husband of the plaintiff here, was in the employ of the defendant, which was a railroad company, operating a line of railroad; that in the discharge of his duties he was injured by the negligence of the defendant, and that on account of that injury he lost his life; that she has been appointed administratrix of his estate, and she claims the right, under the statutes of this Territory, to recover such damages as have been occasioned her and their children.

On the part of the defendant it is admitted that the defendant was a railroad corporation, and operated a line of railroad, as alleged in the complaint; but it is contended on the part of the defendant, in the first place, that there was no negligence on the part of the defendant by which the deceased lost his life; and

68 it is contended again that, if there was negligence on the part of the defendant, that yet the deceased was himself guilty of negligence, which contributed to the injury, and that therefore the defendant is not liable, and that, even though the defendant was guilty of negligence, and that the deceased was in the exercise of due care and was not guilty of any negligence on his own part, that

yet, nevertheless, it was carelessness and negligence not of the defendant but of a coemployé or fellow-laborer of the deceased; and that therefore the defendant is not liable, and these present the questions of fact for you to determine.

The first question will be, whether there was any negligence at all by which the deceased lost his life, any negligence other than his own. If there was, the next question will be, whether he was himself guilty of negligence which contributed to that injury; because if the defendant was itself guilty of negligence, which may have been very gross negligence, yet if the deceased himself was guilty of any want of care, which contributed to that injury, that is, guilty of negligence himself, and that that negligence contributed to that injury, then he cannot recover, no matter what the negligence of the defendant may have been; and that if that should be determined against the defendant, then another question, and that would be, as to whether, if there was negligence, it was on the part of a fellow-workman, a fellow-servant; if there was, then the plaintiff could not recover in this case, because that was a risk that
69 he assumed when he entered into the employment, that he would assume the risks of the carelessness of his coemployés, employés engaged in the same common employment; and if all those be passed in favor of the plaintiff, you come to the question of damages; and those are the questions with which you will have to deal, and I call your attention to them in the order in which I have enumerated them.

And, first, as to the plaintiff being the administratrix of the estate of her deceased husband, I charge you, as matter of law, that the papers which have been introduced here, upon their face, show that she has been duly appointed administratrix of the estate, so that you will have no difficulty, as a matter of fact, with that question.

And the first question, as to whether the deceased lost his life by the negligence of any person other than himself, or the negligence of the defendant. Negligence is a want of due care, according to circumstances. You will see from the definition of it that it is a relative term. It might be negligence to do or abstain from doing a certain thing under some circumstances, when it would be due care and would not be negligence under other circumstances; so that acts charged or claimed to be negligence should be considered with reference to all the surrounding circumstances, and considered in the light of everything surrounding it. And the question is, whether there was a want of due care according to all the circumstances that have been shown, and if there was a want of
70 due care then that is negligence, and if there was not then no negligence has been proven; and, in determining the question as to whether there was negligence, you should remember this definition of it and consider all those facts and circumstances.

The claim on the part of the plaintiff is, that the deceased was employed as a car-repairer in the shops of the defendant company, in the city of Ogden, and, that, acting under the direction of the person, under whose charge he was and subject to whose orders he

was, he was engaged in the act of repairing a car, and that other agents of the company ran a car down against it, and that he was injured. Now, you have to determine, in determining this first question, as to whether there was negligence or not, and determine whether, under all the circumstances, it was a want of due care to run the car down there as it was run at that time. Of course if it was run down there in utter ignorance of anybody being under the car, without knowing it; if a person had been concealed under the car and the agents of the company had run an engine down against it and started it and the person had been killed or injured by it, of course the defendant could not be charged with a want of care in doing so, because it could have had no notice whatever that the person was there. So, you have to consider all these circumstances, the knowledge they have, the reason they have to suppose, if they did not have actual knowledge, that a person was under the car,

71 the reason they had to suppose that a person was under the car, and the place where it was; everything should be taken into consideration to determine whether the people in charge of that train *and* backed it down there onto that stationary car under which, the testimony shows, the deceased was at work; and if they did, whether it was a want of due care, if there was it was negligence on the part of somebody. You would pass that point by determining that it was. If it was not, if the testimony does not show, by a fair preponderance of the evidence, that there was a want of due care in doing that, then you can stop all further deliberation in this case and return a verdict in favor of the defendant; but if that is passed in favor of the plaintiff that there was negligence, *and* then you will pass to the next question; and that is, whether the deceased was himself in the exercise of due care, because, as I have told you before, when it is shown that the deceased or the person injured, was guilty of negligence which contributed to the injury, then, no matter how negligent the defendant itself has been, he cannot recover; the law will not undertake to apportion the damages under such circumstances; and, indeed, it is placed upon the real ground, then, that the contract, when a party enters into the employ of a railroad company, is that they shall take the ordinary risks of the employment, and that will be in the exercise himself of due care to avoid any injury, and if he violates that he violates his contract of service, and he cannot re-

72 cover, no matter how negligent the defendant has been; and, in determining whether Mr. Pool, the deceased, was in the exercise of due care, whether he was guilty of negligence or not, you should remember the definition that I have already given of negligence. It is the same in this sense, when it is set up as contributory negligence, as it is in relation to the defendant. In this instance it is a want of due care according to circumstances.

When this party went under the car, when he went there to repair it, under the direction of his immediate superior, if he did go in obedience to the direction of a superior, you should determine whether he did what an ordinary prudent man, in the exercise of due care to avoid injury to himself, should have done; whether

there were any safeguards that were omitted, and if they were omitted what the reason for it was, whether it was good judgment or whether it was negligence; and determine under all the circumstances of the case, whether he was in the exercise of due care, such as a prudent man ought to have taken to avoid injury to himself. If he was in a dangerous situation, if he was in a situation where he should have apprehended danger, then he should at all times be in a condition to look after it, he should be alive to the situation, to what was apparent to him as well as to everybody else, to avoid danger to himself. And in this respect it is a part of the contract of the employer, that is the defendant in this case, and always is when a party takes another into his service, that he will use due care to protect his servants and not
73 expose him to needless danger and injury; and it is part of the contract of service that he will furnish him a reasonably safe place in which to perform his duty, and reasonably safe implements with which to do the work that he — required to do, and the servant of the company in this instance, could take it for granted that the master had performed that duty, but if there is anything in his surroundings to warn him that that is not the case, then he is put upon his guard, and he should act according to the circumstances that surround him. In other words, to illustrate what I mean, a party, simply because he is directed by his superior, has no right to obey him when he knows or ought to know, by the exercise of common prudence, that what he is about to do will result in injury; he would have no right to put himself where he knows, or must know, that he would be injured if he goes there, even though he is directed, he could and should refuse to obey such orders as that; but if he may rely upon the fact that the master has done his duty to him, and, unless there appears something to the contrary, he may act upon it, and may proceed as far as an ordinary prudent man, in the exercise of due care, ought to do. But when he violated that, if he did anything that he ought not to have done within that rule, or omitted to do anything that he should have done for his safety within that rule, then he is guilty of contributory negligence, and the defendant cannot recover in this case, and you would stop your deliberations at that point and re-
74 turn a verdict in favor of the defendant. But finding that he was in the exercise of due care, then you will come to the question, as to whether he was injured by the defendant company or by the negligence of a coemployé. The rule of law upon that subject is, that when a party enters into the service of another, in addition to what I have already stated the contract to be, it is that he assumes the risk of the negligence of the people that are doing work with him, that are engaged in the same common employment.

In this case, if the injury occurred by the negligence of a fellow-servant within the meaning of the rule, then he cannot recover, no matter how gross or how outrageous the negligence may have been, because it was a risk that he assumed to take upon himself when he entered the employ of the company. As to the party Rice, the testimony tends to show, on the part of the plaintiff, and it is not

disputed on the part of the defendant, that one Rice was in the company of the deceased at the time *of* the accident occurred; and the testimony shows that both the deceased and Rice were what is called car-repairers, doing work in the shops of the defendant company, and as to that, as a matter of law, upon this testimony, I charge you that they were fellow-servants, and if Mr. Pool was injured by the negligence of Rice, then no matter how gross that negligence is, he cannot recover in this case, because they were clearly employed in the same common employment, under the same
75 master and subject to the directions of the same overseer; and consequently, if you find that it was Rice's negligence that caused the injury to Mr. Pool, you can there stop your deliberations and return a verdict in favor of the defendant.

As to the yardmen or switchmen, as they have been called variously in the testimony here, and named, I believe, Kilpatrick and Taylor, the testimony tends to show they were switchmen or brakemen, I believe, and acting as yardmen while they were in the yards of the defendant company at Ogden, where they were at the time this accident occurred; and as to those, I simply state to you, gentleman, the principle of law that governs that, and leave you to determine as a matter of fact as to whether they were fellow-servants of the deceased or not. If they were engaged with the deceased in the same common employment, and subject to the orders of the same master, immediately, then they were fellow-servants. If, on the other hand, they were engaged in different branches of the service, wholly disconnected from each other; if you should find that the defendant, in respect to its service, put it into separate and independent departments, the services of the deceased, Mr. Pool, belonged to one department and these yardmen or switchmen belonged to another, totally different and unconnected with each other, then, I charge you, as matter of law, that they would not be fellow-servants, they would not be within the rule, or within the meaning of the rule. It is the reason—one of the tests by which you may
76 determine, or consider in determining whether they were fellow-servants, is the one that I have already stated, and that is by referring to the contract of service. When Pool entered the service of the railroad company it was part of the contract that he assumes the risks of the people with whom he was working in the same common employment, for instance, the men who were working in the shops with him. If some person was holding an iron while he was doing something else, and that man should carelessly allow it to fall upon him he could recover nothing, for he assumed that risk when he entered the employment. But, if the service was so distinctly in the shops of the company, that it was not within the fair reason and scope of the contract that he made, that he should be liable to suffer injury from the carelessness and negligence of the trainmen who were engaged in another department of the service, who were engaged in running trains and operating with them, then that would not be in the same common employment, because it would not be within the risk that he assumed when he employed with the company. So, you will take into consideration what the

testimony is upon this matter, I leave it to you, as a matter of fact, to determine whether these parties were or were not—and, also, the fireman and engineer upon the train stand in the same situation; that is, I leave that to you in the same way, to determine whether they were engaged in the same common employment, and if they were not then the company, as to the deceased, would be liable
77 for their acts, if they were acting within the scope of the general employment, they would be, and the plaintiff could not recover in this case for any of their negligence.

Now, if you should determine this question against the plaintiff, determine that these parties were engaged in the same common employment, were fellow-servants, then you will stop all further consideration of the case and return a verdict in favor of the defendant, no matter what you have found the other questions in the case; but, passing that also in favor of the plaintiff, then you will come to the question of damages, as to what damages the plaintiff should recover in this case for the loss that has been sustained. And in determining that question, you should consider it purely as a business question and in a pecuniary sense, and determine, as nearly as you can, in a business way, and in a pecuniary sense, what loss this family has sustained by the loss that has occurred to them by this accident. Determine, in the first place, the number of the family, the number of children, and ages of the family, and determine the age of the deceased, his ability to earn wages and provide for the family, determine from your own experience. You can judge as to what his expectancy may have been; and from all these circumstances, determine what, in a pecuniary sense, this family has lost by the loss of the husband and the father; the care he may have given those children; and determine it in a business way,
78 and without sentiment, just how much in a pecuniary sense, they ought to recover for the injury that they have sustained.

Now, I have been requested to give some instructions in the case, and I will call attention to those. I am asked by the defendant to instruct the jury:

"Negligence on the part of the deceased"—and now I apprehend that it is intended that this shall apply to the questions of contributory negligence on the part of the deceased. As applied to that I charge you that it is correct—"Negligence on the part of the deceased is that want of care that a prudent person would ordinarily use in and about the business in which he is engaged." I think I have explained that to you, and it is correct.

"Reasonable care is that care which an ordinarily prudent man would use for his own safety in the work in which he was engaged." That is a reiteration of the same principle, and is correct, and is intended by the defendant to be considered in connection with determining whether the deceased was guilty of contributory negligence, and as applied to that it is correct.

Again, "The jury are instructed, if, from the evidence they find that the deceased failed to exercise reasonable care in not warning the engineer or switchman of his presence under the car, or failed to use reasonable care in any respect for his own safety and protec-

tion, while repairing said car, then the jury should find
79 for the defendant." I think I have explicitly stated that principle, but it is correct.

"If the jury find from the evidence that the deceased, by his want of reasonable care, in performing the work in which he was then engaged, contributed to his injury, then the jury should find for the defendant." That is correct and proper.

Now, gentlemen, in view of the testimony in this case, there are three questions, which I deem proper to be submitted to the jury, for their especial determination, so that the parties may know upon what theory their rights have been adjudged in this case.

And the first is, "What of the employés, of the defendant, if any, were negligent in the discharge of their duty, and by which the deceased was injured?" Now, in answering that, it is expected that you will give the names and occupations, as they have been given in the evidence here, of such persons as you find were guilty of negligence that caused this man's death.

Second, "Wherein were the employés negligent that caused the injury?" Now, taking the two together, it requires you to name the persons who were guilty of negligence, and in what the negligence consisted, and in answering the second you will simply state *was* the negligence was. When you have determined, if you should determine, that it was Rice or that it was Kilpatrick, or any other one of them, and after having named one or more, then, in
80 answer to this second, you will simply say just what it was, and that would get at the party that was careless and what you find the carelessness was.

Third, "Did the deceased use such care and precaution to avoid the injury as a prudent man, in the exercise of due care, should have used?"

That is upon the subject you will see of contributory negligence, asking you whether you find especially that he did or did not. You will be required to answer those three questions in connection with the general verdict. The general verdict will be returned in the usual manner, and along with that you will give these, you will simply write out these answers upon these questions, and the foreman will sign it just as the general verdict is prepared.

Mr. ALLISON: If the court please, I haven't noticed in the charge of the court any instructions as to the burden of proof upon the party in relation to contributory negligence.

The COURT: That question applies particularly to the subject of contributory negligence. If, on the part of the plaintiff, in giving her testimony, it is shown that the deceased was guilty of contributory negligence, why, then, she could not recover upon her own showing. When the plaintiff leaves the case it should be with a showing, by a preponderance of the evidence, that the defendant was guilty of negligence, and that the deceased was in the exercise of due care, and if the evidence fails to disclose any want of due care it may be presumed in
81 the first instance that he was in the exercise of due cares; but if the testimony tends to show that, why, then, the plain-

tiff must, herself, do away with whatever is shown in that respect, and the burden is upon her to that extent. But when the testimony does show acts of negligence on the part of the defendant, and does not disclose contributory negligence on the part of the deceased, then that becomes a matter of defense, and after that the burden will be on the defendant to prove that in their testimony by a preponderance of the evidence. But that is the rule in relation to contributory negligence and applies to that particularly. Upon all other branches of the case, of course it is for the plaintiff to establish her case by a preponderance of the evidence before she can recover.

You are the sole judges of all the facts in the case, the credibility of all the witnesses, and as to what the evidence in the case establishes.

The defendant requested the court to charge the jury, "That under the law and the evidence in this case they should find for the defendant," which instruction the court refused to give, to which refusal defendant then and there excepted.

Mr. MARSHALL: The defendant excepts to so much of the charge of the court as leaves it to the jury as to who were fellow-servants, and the definition in that respect as given by the court to the jury. Also to the law of contributory negligence, as given in said charge, by the court of its own motion. Also to that part of said
82 charge relating to damages, instructing the jury, in estimating the damages, to consider the number and ages of the children of the deceased. The defendant excepts to the refusal of the court to charge, peremptorily, the jury to find for the defendant, under the evidence and the law, as requested by the defendant. The defendant excepts to each and every instruction given by the court on its own motion as well as on that of the plaintiff. The defendant excepts to the refusal of the court to give each and every instruction as asked by defendant, and excepts especially to each of said instructions so refused, and the failure to pass upon the instructions asked by the defendant.

And thereupon the jury retired to consider of its verdict, and thereafter returned a verdict in favor of plaintiff against defendant for the sum of $10,000, and judgment was on said 4th day of April, 1890, entered accordingly, and costs taxed at $——.

The special findings of the jury were to first question, "Kilpatrick," and to two, three and four, yes.

On motion of defendant, defendant was allowed by the court sixty days to prepare, file and serve notice of intention to move for a new trial therein and statement on motion for a new trial.

As an answer to said second special interrogatory, submitted by the court to the jury, "In giving signal to the engineer to back his engine down against the car under which the deceased Pool
83 was working, knowing when he gave such signal that Pool was working under said car."

Assignment of Errors.

The defendant now assigns the following errors and grounds for a new trial, to wit:

First.

Excessive damages, appearing to have been given under the influence of passion or prejudice.

Second.

Insufficiency of the evidence to justify the verdict, and the same is against law, in this, to wit:

a. It fails to show any fault or negligence on the part of the defendant.

b. It shows contributory negligence on the part of plaintiff's intestate in not placing a red flag in front of the car when said Pool was at work, as a signal of danger, and in not seeing that the engineer of the switch-engine was notified of his (Pool's) presence under the car.

c. It shows that the only negligence, other than Pool's, that occasioned the accident, if any such negligence there was, was that of Switchman Kilpatrick, who was a fellow-servant of the intestate.

84 Third.

Errors in law occurring at the trial and excepted to by the defendant, as follows, to wit:

a. The court erred in overruling defendant's motion for a nonsuit.

b. The court erred in its instructions to the jury of its own motion: First, in instructing the jury that if they found that Pool was a car-repairer and in a different line of service from that of the negligent (if any such there was) servant of the company, and that his (Pool's) death was caused by such negligence of such servant, then defendant was liable. Second, in submitting, as a question of fact, to the jury, whether the car-repairer, Pool, was a fellow-servant with the switchman, Kilpatrick. Third, in instructing the jury that the trainmen or yardmen of defendant were not fellow-servants of deceased. Fourth, the court erred, in its instructions to the jury, that in estimating damages, "they should determine the number of the family of the deceased, the number of children, and ages of the family."

c. The court erred in giving the instructions given on its own motion, and in giving such distinct part thereof.

d. The court erred in giving the instructions asked by the plaintiff, and in giving any or either of them.

85 *e.* The court erred in refusing to charge the jury peremptorily to find for the defendant as by it requested.

MARSHALL & ROYLE,
J. S. BOREMAN,
Attorneys for Defendant.

It is hereby certified that the foregoing is a full, true and correct transcript of the record and proceedings in this case.

——— ———,
Attorney for Plaintiff.

May —, 1890.

The foregoing statements on motion for a new trial herein is hereby settled and allowed, and made part of the records herein.

H. P. HENDERSON, *Judge.*

May 19th, 1890.

(Title of Court and Cause.)

Order Denying Motion for a New Trial.

The motion for new trial in this cause having been heretofore argued and taken under advisement by the court, now comes
86 the court, and being fully advised in the premises, orders that said motion be and the same is hereby denied, to which defendant excepts.

Done in open court, June 2d, 1890.

H. P. HENDERSON, *Judge.*

(Title of Court and Cause.)

Notice of Appeal.

To the plaintiff and to Kimball & White, her attorneys, and to the clerk of said court:

Take notice, that the defendant in the above-entitled action hereby appeals to the supreme court of said Territory from the judgment therein rendered and entered in the said district court on the 4th day of April, 1890, in favor of the plaintiff and against the said defendant, and from the whole thereof; and also that the defendant hereby appeals to said supreme court from the order of said district court, made and entered on the 2d day of June, 1890, denying the said defendant's motion for a new trial and refusing a new trial therein.

MARSHALL & ROYLE,
Attorneys for Defendant.

June 5th, 1890.

Filed June 6, 1890.

H. H. HENDERSON, *Clerk,*
By L. B. BEST, *Deputy Clerk.*

Copy served on us this 6th day of June, 1890.

J. N. KIMBALL,
W. R. WHITE,
Att'ys for Pl'ff.

87 TERRITORY OF UTAH, }
County of Weber, } ss:

I, H. H. Henderson, clerk of the district court of the first judicial district of the Territory of Utah, do hereby certify that the fore-

going is a full, true and correct copy of the judgment-roll, notice of intention to move for a new trial, statement of case, order overruling motion for a new trial, and notice of appeal in the hereinabove-entitled action.

And, I further certify that an undertaking on appeal in due form has been properly filed in my office.

Witness my hand and the seal of said court this 16th day of July, 1890.

[SEAL.] H. H. HENDERSON, *Clerk.*

88 In the Supreme Court of Utah Territory, January Term, 1891.

FRIDAY, *January 16th.*

MALOLA POOL, Administratrix, &c., Respondent,
vs.
THE SOUTHERN PACIFIC COMPANY, Appellant. } Appeal from 1st District.

This cause, coming on regularly for hearing, was argued by Thomas Marshall, Esq., for appellant; by James N. Kimball, Esq., in reply; was submitted and taken under advisement.

January Term, 1891.

SATURDAY, *April 18th.*

MALOLA POOL, Administratrix, &c., Respondent,
vs.
THE SOUTHERN PACIFIC COMPANY, Appellant. } Appeal from 1st District.

This cause having been heretofore argued and submitted, and the court being sufficiently advised thereon, it is now here con-
89 sidered, ordered, and adjudged (Blackburn, J., dissenting) that the judgment of the district court therein be, and the same is hereby, affirmed, with costs.

Thereupon, and on application therefor by counsel for appellant, it is ordered that the penal sum of a supersedeas bond to be given on writ of error taking this cause to the Supreme Court of the United States be, and is hereby, fixed at $20,000, and the bond for costs on such writ of error be, and is hereby, fixed at $300.

90 In the Supreme Court of Utah Territory.

MALOLA POOL, Administratrix of the Estate of Joseph S. Pool, Deceased, Respondent,
vs.
THE SOUTHERN PACIFIC COMPANY, Appellant.

Appeal from an order of the first district court in refusing defendant's motion for a new trial, H. P. Henderson, judge.

MINER, *J.:*

This action was brought by the plaintiff as administratrix of the estate of Joseph S. Pool, deceased, to recover damage for the alleged

negligent killing of Joseph S. Pool while repairing a car in defendant's yard at Ogden, Utah, September 12th, 1888. The action was tried with a jury in the first district court at Ogden April 4th, 1890, and a verdict rendered in favor of the plaintiff for the sum of ten thousand dollars.

This defendant assigns as error—

1. Contributory negligence on the part of the deceased,
91 Joseph S. Pool.

2. That Switchman Kilpatrick was a fellow-servant of deceased, and his contributory negligence, if any, caused the death of the deceased, who was a fellow-servant at the time.

3. Excessive damages.

4. Errors in the instructions of the court to the jury.

The undisputed facts in the case show that at the time of the accident in question the deceased, Joseph S. Pool, together with two colaborers named Fowers and Rice, were engaged as car-repairers for the defendant at their shops at Ogden, under the orders of Mr. Starr, their foreman; that on the day in question Fowers and Pool were ordered by Starr to repair a car on the repair track No. one in defendant's yard, where it was customary to make slight repairs to cars. At this place there were six or seven parallel tracks, besides the main track on defendant's line; that Pool and Fowers were engaged in repairing this car in question, and they were in a position under the car near the draw-bars, between the rails of the track, when the noise of an approaching switch-engine warned them of their dangerous position. Plaintiff produced one Frank J. Powers, who testified, in substance, that he heard a noise and remarked to Pool, who was under the car, "I have an idea that they are coming. He said, Yes; they are coming in here. Says I, Let's get out, and Pool immediately moved to get out on the east side of the car. Mr. Rice (the colaborer) was standing by the side of the car outside of the track, and I told him in the hearing of Pool to go and stop the engine and caboose and not let it hit the car. I told him that
92 the car could not go out until it was repaired. Rice said, All right, and then he stepped down to the other end of the car and made signal to stop the engine. The engine came down within six feet of our car and stopped. I heard Rice tell somebody not to hit the car; that we were working on it. As soon as I heard that order given I went to work with Pool under the car. I felt uneasy, however, and I looked out soon after and saw one of the yardmen, Kilpatrick, giving a signal to back up. I said to Pool, 'Look out, Pool: they are right on us,' and I threw myself over the rail and was injured. After I got out I saw Pool lying between the two cars, badly injured; he died soon afterwards. The cars came together with great force and caught Pool between them.

The engineer on the engine was Mr. Weaver; the fireman was Mr. Purdy; the switchman and brakeman were Benjamin Kilpatrick and William Taylor. At the time of the accident they, Kilpatrick and Taylor, were standing about one hundred feet from us. Kilpatrick was acting as one of the switchmen.

We both relied on Rice seeing that the engineer was notified that

we were under the car, and we thought he would attend to it. We put out no red flag as a signal to the engineer before we went under there. Such flag would have notified the engineer. We didn't do it because it was too much work and we thought it would only take a few minutes to make the repairs, and we also knew that I had told Rice to warn the engineer to watch us and not to back up. I heard Rice tell the switchman, Kilpatrick, not to hit the car, and supposed that they would not do so. I heard Rice tell the
93 switchman not to hit the car and that was satisfactory to me.

I heard Rice talking to the switchman, Kilpatrick; I think it was Kilpatrick, and I think Kilpatrick, the switchman, signalled the engineer to back up after he had been warned not to do so by Rice. Kilpatrick was a brakesman in the yard and was sometimes called a switchman. He attended to switching in the yard and doing ordinary work of a brakeman, and helps to make up trains and gives signals to engineers to back up and start. Kilpatrick gave the signal to back up and that caused the accident. Kilpatrick was acting at the time under orders from the yard master. The duty of the car-repairers was to obey the foreman's orders and work in the shop and make small repairs in the yard occasionally.

When Rice spoke to and warned Kilpatrick the engine was about twenty feet away, and I was under the car with Pool and heard Kilpatrick make some reply to Rice."

George C. Rice, a witness produced by the plaintiff, testified in substance "that at this time Kilpatrick was riding on the steps on the fore part of the caboose as this engine backed down toward our car. I told Kilpatrick, the switchman, not to attach to the car—not to hit it—that there were men working under the car. The engine came to within six feet of this car being repaired and stopped after this notice by Rice to Kilpatrick. Soon after this Kilpatrick gave a signal to the engineer for it to come back. The engine came back with great force and Pool was injured and killed."

The defense offered no proof, and Kilpatrick was not sworn
94 in the case. Pool was an able-bodied man of good character; 29 years of age at the time of his death, and was receiving seventy-five dollars per month from the defendant, and had a wife and several children dependent upon him for support. The jury found as special findings of fact, upon questions submitted to them by the court, that Kilpatrick was negligent in the discharge of his duty as switchman in giving signals to the engineer to back his engine down against the car under which the deceased, Pool, was working, knowing when he gave such signal that Pool was working under the car. They also found that at the time of the injury Pool was using such precaution and care to avoid injury as a prudent man, in the exercise of due care, should do, and that Kilpatrick was not a fellow-servant of Pool.

From the testimony given in the case, we are satisfied that Kilpatrick was not a fellow-servant of the deceased, but was then engaged in a different kind and department of service, and was not in the same common employment, and was under the orders of a different master. Nor can there be any question made but that

Kilpatrick heard the signal from Rice to stop the engine, and that he acted upon such signal and did stop the engine about six feet from the car in question, under which the deceased was working at the time. The signal was understood by the switchman, Kilpatrick, and obeyed by him. The verbal communication to Kilpatrick to stop the engine was a notice and warning as certain, positive, and safe as if there had been a red-flag signal used in such case. In any event, Kilpatrick received it, understood it,
95 and replied to it and complied with it at the time, and he would have done no more had there been a red-flag signal place- by the car.

Fowers and the deceased, Pool, assumed, as they would have a right to assume under the circumstances, and as the jury found, that there would be no danger in proceeding with their work, and before they had completed it Kilpatrick, the switchman, with notice of their position and danger and without giving any warning, negligently gave the signal to back up, and the engine immediately backed up with great force and Pool was caught between the cars and killed.

"An employer is not liable for injuries to his servant caused by the negligence of a fellow-servant in a common employment; but this exemption does not extend to injuries caused by the carelessness or negligence of another person in the master's service in an employment not common to that in which the person injured is engaged, and upon a subject in regard to which the person injured has a right to look for care and diligence on the part of the other person as the representative of a common master."

Daniels *vs.* Railway Co., 23 Pac. Rep., 762.
Railroad Co. *vs.* Kelly, 127 Ill., 637.
Railway Company *vs.* Ross, 112 U. S., 377.
Morton *vs.* Detroit B. C. & A. R'y Co., 46 N. W. Rep., 111; 61 Am. Dec., 101.
Railway Co. *vs.* Morganstein, 106 Ill., 216.
Caine *vs.* R'y Co., 128 U. S., 91.
Reddon *vs.* Union Pac. R'y Co., 5 Utah, 344.
Huff *vs.* R'y Co., 100 U. S., 213.
Northern Pac. R'y Co. *vs.* Hebert, 116 U. S., 642.

96 The special instructions were properly submitted by the court to the jury, and their findings under the evidence should not be disturbed.

Comp. Laws, 1888, sec-. 3374, 3978.
Webb *vs.* Denver & Rio Grande R'y Co., 24 Pac. Rep., 616.

So also we think the question of negligence or contributory negligence was properly submitted to the jury. In such cases, in order to determine whether an employee by recklessly exposing himself to peril has failed to exercise that degree of care for his personal safety that might reasonably be expected, has thus by his own negligence contributed to cause the accident, regard must always be had to the circumstances of the case and to the exigencies of his

position; and the decision of this question ought not to be withheld from the jury unless the evidence, after giving the plaintiff the benefit of every inference to be fairly drawn from it, so conclusively shows contributory negligence that the court would be compelled, in the exercise of sound judicial discretion, to set aside any verdict rendered or returned in his favor.

Kaine *vs.* Northern Central R'y Co., 128 U. S., 91.
Morton *vs.* Detroit B. C. & A. R'y Co., 46 N. W. Rep., 111.
Detroit & Milwaukee R'y Co. *vs.* Steinberg, 17 Mich., 99.

Defendant's counsel contend that the trial court erred in instructing the jury, among other things, that they should "determine, in the first place, the number of the family, the number of the children, and the ages of the family, and determine the age of the deceased, his ability to earn wages and provide for the family;
97 determine from your own experience. You can judge as to what his expectancy may have been, and from all these circumstances determine what in a pecuniary sense this family has lost by the loss of the husband and father, the care he may have given those children, and determine it in a business way and without sentiment just how much in a pecuniary sense they ought to recover for the injury that they have sustained."

Sec. 2962, Compiled Laws, reads as follows: "That every such action shall be brought by and in the name of the personal representative of such deceased person, and the amount received in every such action shall be distributed by direction and decree of the proper probate court to such persons (other than creditors) as are by law entitled to distributive shares of the estate of such deceased person in such proportions as are prescribed by law."

* * * Sec. 3179, Comp. Laws, 1888, reads as follows:

"When the death of a person, not being a minor, is caused by the wrongful act of another, his heirs and personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section such damages may be given as under all circumstances of the case may be just." The evident purpose of these provisions of the statute was to allow the widow and heirs or personal representatives of the deceased to recover such pecuniary damages as under all the circumstances
98 of the case were just. Now, what were the circumstances of the case contemplated by the statute from which the jury are to estimate the damages? Plainly, they should determine from the evidence in the case, based upon well-defined facts or known circumstances, what the pecuniary injury and loss to the wife and children was resulting from the death which was made the basis of the action; and to ascertain these fairly the jury should know and determine the number in the family dependent upon him for support and previously provided for the number and ages of the children; their kindly demeanor towards each other or the lack of it; the loss of his society as a husband and father; the age and

health of his wife and the age and health of the deceased; his ability to earn wages and provide for his family; determine what he has done and was then doing or would be likely to do for his family, and from these facts and circumstances determine what pecuniary damages the wife and family were justly entitled to as pecuniary compensation to them resulting from the death in question. What the family would lose by the death would be what it was accustomed to receive or had reasonable expectation of receiving in his lifetime. The extent of the loss should not be measured by the wealth or poverty of the recipients or giver, but by his beneficent and pecuniary contributions given or in reasonable expectation of being given to the widow and heirs, as shown by the proof, and judged from all the circumstances of the case to be just, but measured by pecuniary standard. If the testimony did not show that there were heirs living who were pecuniarily injured by
99 his death, no recovery should be had, as in that case no one had sustained any pecuniary loss or injury by his death.

Van Brunt *vs.* R'y Co., 78 Mich., 530.
Chicago & N. W. R'y Co. *vs.* Bayfield, 37 Mich., 205.
Balch *vs.* R'y Co., 34 N. Y. Rep., 884.
Tilly *vs.* R'y Co., 24 N. Y., 471.
Penn. R. R. Co. *vs.* Goodman, 62 Pa. St., 339.
Railroad Co. *vs.* Keller, 67 Penn. St., 300.
Staal *vs.* G. K. & S., 57 Mich., 239.
Railroad Co. *vs.* Shannon, 43 Ill., 338.
Matthews *vs.* Warner, 29 Grat., 570.
Lockwood *vs.* Railroad Co., 98 N. Y., 523.
Cook *vs.* R. R. Co., 60 Cala., 604.
Webb *vs.* D. & R. G. R'y Co., 24 Pac. Rep., 616.
Beeson *vs.* Green Mountain G. M. Co., 57 Cal., 38; 84 Cal., 529.

The amount of damages to be given was a question for the jury to determine under the statute, and we cannot disturb their findings in this case. On the whole record we find no error.

The judgment of the lower court is affirmed.

We concur.

(Signed) ZANE, *C. J.*
ANDERSON, *J.*

Endorsed: Title court & cause. Opinion. Filed April 18th, 1891. Jos. P. Bache, clerk.

100 In the Supreme Court of Utah Territory.

MALOLA POOL, Administratrix of the Estate of Joseph S. Pool, Deceased, Respondent,
vs.
THE SOUTHERN PACIFIC COMPANY, Appellant.

BLACKBURN, *J.*, dissenting:

This suit is brought to recover damages for the death of Joseph S. Pool, caused, as is claimed, by the negligence of the defendant company.

A trial was had and verdict and judgment for plaintiff; defendant moved for a new trial, which was overruled, and it appealed.

The undisputed facts are substantially as follows:

Decedent and one Fowers were employees of the defendant company at work at Ogden in its repair shops, and were directed by the foreman to make some slight repairs on a car on a track in the yard. They went to the car and had to go under it to make the repairs, and did not put out the usual signal, a red flag, for their protection, thinking, as the witness explained, it was too much trouble for the length of time it would take them to do the work. After they had commenced work they heard an engine coming, and one of them requested a man by the name of Rice, a fellow-servant en-
101 gaged in the repair shop, to stop the engine and give warning that they were at work on the car. The engine stopped a few feet from the car they were at work upon, and they resumed work, and in a very short time a switchman employed in the yard by the name of Kilpatrick gave a signal to the engineer to back up, which he did with great force, and the decedent was injured and died in a very short time.

The evidence in behalf of the plaintiff in reference to what took place immediately preceding the accident is as follows:

FOWERS: When I saw the engine come down upon us I said to Rice, Go and stop him, and don't let him hit this car at all, as it has to be repaired before it can go out. I saw him go to the other end of the car and give the usual signal to stop. He did not say anything at that time. They came within about six feet of the car and stopped. I heard Mr. Rice tell somebody not to hit this car; that they were working there. We went right to work again under the car. I heard Rice speak to Kilpatrick, and I heard Kilpatrick make some reply, but I did not know what it was. The car was moving then and moved up to about six feet and stopped. He told Kilpatrick not to hit the car, and I think he told him we were working there.

RICE: I had no conversation further than to tell Kilpatrick not to touch the car, for men were working there. He was twenty or thirty feet away at the time. They stopped within about six feet of the car. The next thing I saw was Kilpatrick signaling
102 the engineer to back up, and it came back with great force.

Three errors are assigned for the reversal of this case:

1. Contributing negligence of the decedent.
2. Kilpatrick was a fellow-servant of the deceased.
3. Excessive damages.

I think Kilpatrick was not a fellow-servant of the deceased, under the rule laid down by this court in the case of—

Daniels *vs.* The Union Pacific Railway Co., 23 Pac. Rep., 762.

I adhere to that decision, and think it states the best rule, considering the many divers decisions on that subject.

The jury found that he was not a fellow-servant, and also his negligence caused the death of the decedent.

These findings would sustain the verdict if there was no want of reasonable care contributing to his death on the part of the decedent. This question was also submitted to the jury: "Did the deceased use such care and precaution to avoid the injury as a prudent man in the exercise of due care should have used?" To this question the jury answered "yes."

I have disposed of the question as to whether Kilpatrick was a fellow-servant of the deceased.

But the important one was the decedent guilty of contributory negligence? The jury found he was not. Was that finding right, and, if not right, is the appellate court bound by it? The rule is, if the finding of the jury is clearly and manifestly against the weight of the evidence, the trial court should grant a new trial, and if it fails to do that it is error, and the appellate court should reverse.

Hillard on New Trials, 336 & 339.
103 Keagy *vs.* Hite, 12 Ill., 100.
Belden *vs.* Innis, 84 Ill., 78.
Insurance Co. *vs.* Beck, 74 Ill., 165.
Burton *vs.* Hubel *et al.*, 18 Ind., 181.
Smith *vs.* Ireland, 4 Utah, 187.
Hopkins *vs.* Ogden City, 5 Utah, 390.

I think in this case the jury wholly misconceived the force and effect of the evidence. It was all given in behalf of the plaintiff. The decedent neglected to put out the well-known and usual signal of warning, a red flag, because it was too much trouble, and trusted to one Rice to protect him. Rice was his fellow-servant, and if he was hurt by the negligence of Rice, his fellow-servant, the plaintiff cannot recover.

Rice says he told Kilpatrick, the switchman, who was controlling the engineer running the engine, not to touch the car; the decedent was at work under it; that Kilpatrick was 20 or 30 feet away; he does not say that Kilpatrick heard him; indeed he was not asked that question. If Kilpatrick heard the warning and notwithstanding signaled the engineer to move back, his act was more than negligence—it was malice and murder. We cannot think that Kilpatrick heard the warning. We are not ready to presume him guilty of deliberately killing the decedent. Rice must have failed to make Kilpatrick hear and understand him. If so, Rice's negligence contributed to the injury and the defendant was not guilty of negligence through Kilpatrick, and the plaintiff cannot recover.

104 But was the failure of the decedent and Fowers, his companion, guilty of contributory negligence in not hanging out the red flag, the usual signal, and one that the switchman and the engineer and everybody connected with the operation of the railroad understood and respected? I think they were.

In all human probability the accident would not have *have* happened if the red flag had been put up. The engineer would have seen it, and not have obeyed the signal of the switchman. The

switchman would have seen it and not have given the signal to back up.

By entrusting their safety to Rice they took the chances of his carelessness in giving the proper information to the switchman and the chances of the switchman hearing and understanding Rice. Their safety would have been certain if the flag had been hung out. It was a mute and silent warning, but neither switchman or engineer could have mistaken it, nor would they have disobeyed it.

I think, therefore, as a matter of law, that the decedent by neglecting to use the well-known signal, the usual and well-understood precaution, and trusting to the chance of a fellow-servant protecting him was contributory negligence on his part, and the plaintiff cannot recover.

Railroad employees occupy very responsible positions; the safety of themselves, their fellow-employees, the safety of the property of the company, and the lives of the traveling public depend upon their diligence in the performance of their duties and in the
105 strict use of the ordinary precautions, well understood and prescribed by the company.

Railroad employees may not at their pleasure set aside the rules and precautions made by the company for their protection and substitute others without assuming all the risks consequent upon such substitution.

The other alleged errors need not be noticed, as this one is sufficient to reverse the case.

I think the trial court should have granted a new trial.

And this case should be reversed and a venire *de novo* awarded.

Endorsed: Title of court and cause. Dissenting opinion. Filed April 18, 1891. Jos. P. Bache, clerk.

106 In the Supreme Court of Utah.

MALOLA POOL, Administratrix of the Estate of Joseph S. Pool, Deceased, Respondent,
vs.
THE SOUTHERN PACIFIC COMPANY, a Corporation, Appellant.

United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington the second Monday of October, A. D. 1891, pursuant to a writ of error filed in the clerk's office of the supreme court of Utah Territory, wherein The Southern Pacific Company is plaintiff in error and you, Malola Pool, as administratrix, etc., are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to each of the parties in that behalf.

Witness the Honorable Charles S. Zane, chief justice of the territory of Utah, this 20th day of April, A. D. 1891.

C. S. ZANE,
Chief Justice of Utah Territory.

To Malola Pool and to Messrs. Kimball & White and E. M. Allison, her attorneys.

107 THE UNITED STATES OF AMERICA, } ss:
Territory of Utah, }

On the 23rd day of April, A. D. 1891, personally appeared Wm. Butcher, deputy U. S. marshal for Utah Territory, before me, the subscriber, clerk of the 1st district court in and for the Territory of Utah, and makes oath that he delivered *of* the within citation to E. M. Allison, Jr., one of the attorneys for the within-named defendant in error, at his office, in Ogden City, Utah Territory, on the 23rd day of April, A. D. 1891.

WM. BUTCHER.

Subscribed and sworn to before me this 23rd day of April, A. D. 1891.

[Seal 1st Judicial District, Territory of Utah, United States of America.]

C. H. McCLURE,
Clerk of the 1st District Court of Utah.

Fees, $1.00.

107½ [Endorsed:] Supreme court of Utah. File No., 110. The Southern Pacific Company, plaintiff in error, *vs.* Malola Pool, adm'x, etc., def't in error. Citation (original). Rec'd copy April 23d, 1891. Kimball, White, E. M. Allison, Jr., att'ys for def't in error. Filed on return April 24, 1891. Jos. P. Bache, clerk.

108 In the Supreme Court of the United States.

THE SOUTHERN PACIFIC COMPANY, Plaintiff in Error, }
vs.
MALOLA POOL, Administratrix, &c., Defendant in Error. }

Assignment of Errors and Prayer for Reversal.

Now comes the plaintiff in error above named, and, upon the record and proceedings of the supreme court of Utah Territory, assigns as error—

That the said supreme court of Utah Territory erred in sustaining the decision and action of the said district court of the first judicial district of said Territory, and thereby perpetuating and continuing the following errors:

First.

Excessive damages, appearing to have been given under the influence of passion or prejudice.

Second.

Insufficiency of the evidence to justify the verdict, and the same is against law, in this, to wit:

A. It fails to show any fault or negligence on the part of the defendant.

B. It shows contributory negligence on the part of plaintiff's intestate in not placing a red flag in front of the car when said Pool was at work as a signal of danger and in not seeing that the engineer of the switch-engine was notified of his (Pool's) presence under the car.

109

C. It shows that the only negligence other than Pool's that occasioned the accident, if any such negligence there was, was that of Switchman Kilpatrick, who was a fellow-servant of the intestate.

Third.

Errors in law occurring at the trial and excepted to by the defendant as follows, to wit:

A. The court erred in overruling the defendant's motion for a nonsuit.

B. The court erred in its instructions to the jury of its own motion: First. In instructing the jury that if they found that Pool was a car-repairer and in a different line of service from that of the negligent (if any such there was) servant of the company, and that his (Pool's) death was caused by such negligence of such servant, then defendant was liable. Second. In submitting as a question of fact to the jury whether the car-repairer, Pool, was a fellow-servant with the switchman, Kilpatrick. Third. In instructing the jury that the trainmen or yardmen of defendant were not fellow-servants of deceased. Fourth. The court erred in its instructions to the jury that in estimating damages "they should determine the number of the family of the deceased, the number of children, and ages of the family."

C. The court erred in giving the instructions given on its own motion and in giving such distinct part thereof.

110

D. The court erred in giving the instructions asked by the plaintiff and in giving any or either of them.

E. The court erred in refusing to charge the jury peremptorily to find for the defendant, as by it requested.

Wherefore and in consideration of the said errors the plaintiff in error prays this court for judgment and reversal of said decision and judgment of said supreme court of Utah Territory, and that the said cause be remanded with direction that such further action and proceedings may be taken therein as may be in accordance with law.

(Signed) THOMAS MARSHALL,
Attorney for Plaintiff in Error.

Endorsed: Title court and cause. Assignment of errors. Filed April 28th, 1891. Jos. P. Bache, clerk.

111 THE UNITED STATES OF AMERICA, } ss:
Territory of Utah, }

The President of the United States to the honorable judges of the supreme court of the Territory of Utah, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, between Malola Pool, administratrix of the estate of Joseph S. Pool, deceased, plaintiff and respondent, and The Southern Pacific Company, a corporation, defendant and appellant, manifest error hath happened, to the great damage to the said The Southern Pacific Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2nd Monday of October, 1891, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

112 Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, and the seal of the supreme court of the Territory of Utah this twentieth (20) day of April, in the year of our Lord one thousand eight hundred and ninety-one.

Seal Supreme Court, Territory of Utah, United States of America.

JOSEPH P. BACHE,
Clerk of the Supreme Court in and for the Territory of Utah.

113 [Endorsed:] Supreme court of Utah. File No., 110. The Southern Pacific Co., pl't'ff in error, *vs.* Malola Pool, admin'x, etc., def't in error. Writ of error, original. Filed in the supreme court Apr. 20, 1891, at Salt Lake City, Utah, and a copy deposited with me. Joseph P. Bache, clerk.

114 TERRITORY OF UTAH, } ss:
County of Salt Lake, }

In the Supreme Court of the Territory of Utah.

MALOLA POOL, Administratrix of the Estate of Joseph S. Pool, Deceased, Respondent,
vs.
THE SOUTHERN PACIFIC COMPANY, a Corporation, Appellant.

Bond on Writ of Error in Supersedeas and for Costs.

Know all men by these presents that we, The Southern Pacific Company, a corporation, as principal, and John E. Dooly and

Thomas Marshall, as sureties, are held and firmly bound unto Malola Pool, administratrix of the estate of Joseph S. Pool, deceased, in the full and just sum of twenty-one thousand ($21,000.00) dollars, to be paid to the said Malola Pool, as said administratrix, her certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 20th day of April, A. D. 1891.

115 Whereas on April 18th, A. D. 1891, the supreme court of the Territory of Utah did make and enter a judgment in the above-entitled action, affirming a judgment of the district court of the first judicial district of the Territory of Utah, rendered on April 4th, 1890, in an action then pending in the said court, wherein the above-named Malola Pool, as administratrix of the estate of Joseph S. Pool, deceased, was plaintiff and the above-named Southern Pacific Company was defendant;

And whereas the said Southern Pacific Company has obtained a writ of error and filed a copy thereof in the clerk's office of the supreme court of the Territory of Utah to reverse said judgment in the aforesaid suit, and a citation directed to the said Malola Pool, as administratrix of the estate of Joseph S. Pool, deceased, citing and admonishing her to be and appear at a Supreme Court of the United States to be holden at Washington on the 12th day of October next:

Now, the condition of the above obligation is such that if the said Southern Pacific Company shall prosecute said writ to effect and answer all the damages and costs if it fails to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

(Signed) THE SOUTHERN PACIFIC COMPANY,
By THOS. MARSHALL,
Its Attorney. [SEAL.]
THOMAS MARSHALL. [SEAL.]
JOHN E. DOOLY. [SEAL.]

Witness:
H. T. DUKE.

116 TERRITORY OF UTAH, } ss:
County of Salt Lake, }

John E. Dooly and Thomas Marshall, sureties in the above bond, being first duly sworn, each for himself deposes and says that he is a resident and freeholder within the county of Salt Lake, in the Territory of Utah, and worth the sum specified in said bond as a penalty therefor over and above all his just debts and liabilities, exclusive of property exempt from execution.

(Signed) THOMAS MARSHALL.
JOHN E. DOOLY.

Subscribed and sworn to this 20th day of April, A. D. 1891.
(Signed) HARRY T. DUKE,
Notary Public.

The above bond is by me approved this 20th day of April, 1891.
(Signed) C. S. ZANE,
Chief Justice.

Endorsed: Original. Title court. The Southern Pacific Company *vs.* Malola Pool, administratrix, &c. Supersedeas bond and bond for costs. Filed April 20th, 1891. Jos. P. Bache, clerk.

117 UNITED STATES OF AMERICA, } ss:
Territory of Utah, County of Salt Lake, }

I, Joseph P. Bache, clerk of the supreme court of said Territory of Utah, in pursuance of the attached writ of error, do return, annexed hereto and to said writ, the original citation, a transcript of the record, the proceedings, opinions, assignment of errors, supersedeas bond, all in and of said court in the cause in said writ described, to the Supreme Court of the United States; and I hereby certify that said annexed transcript of said record, proceedings, opinions, assignment of errors, and bond is a full, true, and complete copy of the several originals thereof on file or of record in my office.

Seal Supreme Court, Territory of Utah, United States of America.

In witness whereof I hereunto set my hand and the seal of said supreme court of Utah Territory this 28th day of April, A. D. 1891, at Salt Lake City.

JOSEPH P. BACHE,
Clerk of Supreme Court of Utah Territory.

Endorsed on cover: Case No. 14,623. Utah Territory supreme court. No. 152. The Southern Pacific Company, plaintiff in error, *vs.* Malola Pool, administratrix of Joseph S. Pool, deceased. Filed May 4, 1891.

Office Supreme Court, U. S.
FILED.
JAN 5 1895
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 152.

THE SOUTHERN PACIFIC COMPANY,
Plaintiff in Error,

against

MALOLA POOL, Administratrix of Joseph S. Pool, deceased,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

MAXWELL EVARTS,
Of Counsel.

C. G. Burgoyne, Walker and Centre Streets N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 152.

THE SOUTHERN PACIFIC COMPANY,
Plaintiff in Error,

AGAINST

MALOLA POOL, Administratrix of Joseph S. Pool, deceased,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

Statement.

On the 12th day of September, 1888, Joseph S. Pool, the husband of the plaintiff below, was employed as a car repairer by the Southern Pacific Company at Ogden City, in the Territory of Utah, and had been so employed for three years or more prior to his death (Rec., pp. 7 and 9). His duty was to repair the cars in the yards as well as in the shops of the company (Rec., pp. 15, 31), and in consequence he in the course of his

work came into contact with the brakemen and switchmen employed about the yards and tracks. On the day he was injured Pool and another car repairer, Frank J. Fowers, were ordered by Starr, the foreman of the car shops to repair a certain car then lying in the yard (Rec., p. 10). The defect in the car which was to be remedied, was of slight importance the only thing required being the fastening of a new iron strap underneath what is called the " Miller hook " for the purpose of keeping it in place. The car was the last one attached to a train that " was leaving for the West " and when the men went to the car for the purpose of replacing the strap it was nearly time for the train to start (Rec., p. 10). It appears from the record that as soon as the caboose was coupled on the train would have been ready to go out. It was impossible for the men to do the work which they had been directed to do without uncoupling the car from the train and this they did (Rec., p. 11). Pool and Fowers were assisted in moving the car by *another car repairer* named George Rice (Rec., p. 11). After the men had got the car into a proper position Pool and Fowers went to work on it (Rec., p. 11), but *they failed to set up a red flag as a warning to the engineers and yardmen that they were underneath the car*, notwithstanding the fact that they knew that the train was nearly ready to leave and that the caboose was about to be coupled on to the car upon which they were at work. *They omitted to set up this red flag because it was too much work* (Rec., p. 16). Shortly after they had commenced work upon the car the men heard the noise of an engine switching. Fowers said to Pool: " I have an idea that they are coming in here." Pool, who was in a position where he could see better than Fowers, looked out and then replied, " Yes ; they are coming in here " (Rec., p. 11). Fowers then stepped out on the east side, the opposite side to that where the switchman was, and, of course, to that where the engineer was looking (Rec., pp. 11, 14 and 15). Pool did not

step out from under the car at all, and his presence was, therefore, unknown to either switchman or engineer. Fowers said to Rice, *another car repairer*, "You go and stop him and don't let him hit this car at all." Rice replied, "All right," and stepped down to the end of the car, where Fowers saw him signal the engineer to stop. Then Fowers heard Rice call to *somebody* not to hit the car, that they were working there (Rec., p. 11), *but there is no evidence that the "somebody" spoken to by Rice heard his request, or that Rice or Fowers attempted to make sure that his warning was heard.* On hearing Rice call to somebody "not to hit the car," Fowers went back to work under the car with Pool. It appears that the "somebody" spoken to by Rice was Kilpatrick, a switchman or brakeman employed in the yard at Ogden City (Rec., pp. 17 and 25), and that he was some twenty or thirty feet off, on or near a moving train, when spoken to by Rice (Rice's Test., pp. 25 and 26). The caboose came within six feet of the car and stopped. Fowers says that he felt uneasy for fear that they might try to couple the caboose to the car they were under and looking out saw one of the yardmen give the signal to back up (Rec., p. 12). He called out to Pool and jumped out to save himself. Pool undertook to escape, but was caught between the car he was repairing and the rest of the train. He was severely injured and died the next day.

An action was thereafter brought by the widow of Pool against the Southern Pacific Company in the District Court of the First Judicial District of Utah, in which it was charged that the accident was caused by the carelessness and negligence of the defendant. The action was brought by the plaintiff as Pool's personal representative and in behalf of the persons entitled by law to distributive shares of his estate (§ 2962, Compiled Laws of Utah). The Southern Pacific Company offered no evidence in its behalf, but at the close of the plaintiff's case moved for a nonsuit. This motion was denied and an exception taken.

The defendant thereupon rested. At the close of the charge to the jury by the trial Judge the defendant requested the Court to charge the jury " that under the law and the evidence in this case they should find for the defendant." This instruction the Court refused to give, to which refusal the defendant then and there excepted, and at the same time excepted to certain specified portions of the charge of the Judge. The plaintiff recovered a verdict for the sum of $10,000 (Rec., p. 40). A motion was made for a new trial, which was denied (Rec., p. 42). An appeal was then taken from the judgment entered upon the verdict and from the order denying the motion for a new trial to the Supreme Court of Utah Territory. The judgment of the lower court was affirmed. *One Judge, however, dissented.* The case was then brought to this Court by a writ of error.

Specification of Errors.

First. The trial Court erred in refusing to grant the defendant's motion for a nonsuit made at the close of the plaintiff's case, as follows :

" The defendant now moves the Court to grant a nonsuit in this case :

" First, because no negligence has been shown on the part of the defendant.

" Second, that the evidence shows contributory negligence on the part of the deceased " (Rec., p. 33.).

Second. The Court erred in refusing to charge the jury as requested by the defendant :

" That under the law and the evidence in this case they should find for the defendant " (Rec., p. 40).

Third. It was error on the part of the Court to charge the jury that in determining the question of damages they should " determine, in the first place, the number of the family, the number of children and ages

of the family" (Rec., p. 38) of the deceased, to which portion of the charge of the Court due exception was taken by the defendant (Rec., p. 40).

FOURTH. The Court erred in denying the motion made by the defendant for a new trial upon the grounds stated at page 41 of the record.

Point I.

THE PLAINTIFF'S INTESTATE ON ENTERING THE SERVICE OF THE SOUTHERN PACIFIC COMPANY ASSUMED AS ONE OF THE INCIDENTS OF HIS EMPLOYMENT THE RISK OF BEING INJURED BY THE NEGLIGENCE OF KILPATRICK; THAT IS TO SAY, POOL AND KILPATRICK WERE FELLOW-SERVANTS, AS THE TERM IS USED IN LAW.

Upon the trial of the case the Court submitted to the jury the following question: "What of the employees of the defendant, if any, were negligent in the discharge of their duty and by which the deceased was injured?" (Rec., p. 39). To this the jury replied, "Kilpatrick" (Rec., p. 40). Admitting for the moment that there was some evidence to sustain the finding of the jury that the accident was caused by the negligence of Kilpatrick, yet he was a yardman or brakeman (Rec., p. 17) employed by the same master who employed the plaintiff's intestate and was engaged in the same common employment, the furtherance of the company's business of running trains, and as a matter of law he was a fellow servant of the deceased. The plaintiff in error was, therefore, not legally responsible for his negligence.

The principle that a servant cannot recover from his master for any injury caused by the negligence of a co-servant is but another and narrower statement of the

more general proposition that a workman assumes all the obvious risks incident to his employment, among which are the risks which he incurs by reason of the negligence of the men with whom he works.

This doctrine in its broader form was first adopted by this Court in Randall vs. Baltimore & Ohio R. R. Co., 109 U. S., 478, and it seems never to have been departed from in any reported case, with the possible exception of the case of Chicago & Milwaukee R. R. vs. Ross, 112 U. S., 377, which has no bearing upon the present controversy. In the Randall case it was said:

"The general rule of law is now firmly established that one who enters the service of another takes upon himself the ordinary risks of the negligent acts of his fellow servants in the course of the employment" (p. 483).

Pool was a car repairer, and Kilpatrick was a switchman, brakeman or yardman (Rec., p. 17). They worked together in the same place, viz,, the depot yard at Ogden City. The question which then presents itself is, "Were they fellow-servants?" The answer depends wholly upon whether this Court approves the rule that all servants employed by a common master in the same general service are co-servants, and that the liability of the master for the injury of one servant by the negligence of another depends upon whether the injured man assumed the risk of the negligence of the man who was careless, or recognizes the exception to this rule which has been developed in some of the State Courts, viz., that men employed by the same master in different departments of the same enterprise are not co-servants.

This exception, which is sometimes called the departmental doctrine, does not seem ever to have been approved by this Court.

In the case of Quebec Steamship Co. vs. Merchant, 133 U. S., 375, a stewardess on an ocean steamer was injured through the negligence of either the porter or the carpenter on board the vessel. "The persons com-

posing the ship's company were divided into three classes of servants called *three departments—the deck department*, containing the first and second officers, the purser, the *carpenter* and the sailors; the *engineer's department*, containing the engineers, the firemen and the coal passers, *and the steward's department*, containing the steward, the waiters, the cooks, *the porter and the stewardess*" (syllabus). The stewardess brought a suit for damages against her employer, the steamship company, and the trial Court left it to the jury to determine whether the injury was caused by the act of a servant not employed in the same department with the plaintiff. This was held error by this Court, which decided that the Judge should have directed the jury to find for the defendant upon the ground that the negligence was that of a fellow-servant, either the porter or the carpenter.

It would appear that if the departmental doctrine was ever to be applied it should have been in the case cited, as it would be hard to find any enterprise, the business in the different divisions of which was more distinct than that of the deck department and the steward's department upon an ocean steamer. But Mr. Justice BLATCHFORD, in his opinion at page 378, says:

"The contention of the plaintiff is that, as the carpenter was in the deck department and the stewardess in the steward's department, those were different departments in such a sense that the carpenter was not a fellow-servant with the stewardess. But we think that, on the evidence, both the porter and the carpenter were fellow-servants with the plaintiff. * * * The plaintiff took upon herself the natural and ordinary risks incident to the performance of her duty, and among such risks was the negligence of the porter and the carpenter, or of either of them, in the course of the common employment of the three."

The conclusion to be drawn from the Quebec Steamship Company case would seem to be that when servants are employed in different departments of the

same general business, and in the course of their work come into contact with each other, they are to be considered as fellow-servants within the meaning of the term as used in law. In short, the true test is not an arbitrary rule that a servant in one branch of a great industrial enterprise cannot be a co-servant with an employee in some other division. We must go back to the general principle that "*prima facie*, all who enter into the employ of a single master are engaged in a common service, and are fellow servants," and "each knows, when entering into that service, that there is some risk of injury through the negligence of other employés, and that risk, which he knows exists, he assumes in entering into the employment" (Baugh Case, 149 U. S., 368, 384), and see if there is any reason for supposing that the injured man did not assume the risk of the negligence which resulted in the accident to him, because, for example, from the nature of his business he could not possibly have supposed that he would ever have been injured by the negligence, the ill consequences of which he suffered. The case suggested is hardly a probable one, but, admitting it to be a possible one, it might be that this Court would decide that the plaintiff in such a case should recover, not on the ground that the servants were in different departments, but because the plaintiff had not assumed the risk of the negligence. In other words, there are no exceptions, at least, none recognized by this Court, to the rule that all men employed by the same master in a common employment are co-servants, but the question of liability or non-liability of an employer for injury to his servant by the negligence of another servant must always depend upon whether the employee did or did not assume the risk of the particular negligence of his fellow-servant when he entered the service of their common master. "The material question in each case is essentially one of contract, though usually of implied, as distinguished from express, contract—Was the risk from which the

injury resulted a risk which the injured person undertook, as between himself and his employer, to bear?"

Conway vs. B. & N. C. R'way. Co., 11 Ir. Rep. C. L., 345, 351.

The Petrel, L. R., Pro. Div. (1893), 320, is, perhaps, an illustration of an accident happening by reason of the negligence of a workman, the risk of which a fellow workman would not be taken to have assumed upon entering the employ of their common master. In that case there was a collision at sea between the steamship "Petrel" and the steamship "Cormorant," both vessels being owned by the General Steam Navigation Company. The collision was caused by the negligence of those navigating the "Petrel." One of the questions in the case was whether the crew of the "Cormorant" had any claim against the "Petrel" for their effects lost by reason of the accident. It was said that they had not because of their common employment with the crew of the "Petrel." The Court, however, held that they could recover, and said at pages 323 and 326:

"No doubt the captain and crew of the 'Cormorant' had a common master with the captain and crew of the 'Petrel;' but were they in common employment with each other? * * * *Can it be said that the safety of the captain of one ship of a company is in the ordinary and natural course of things dependent on the skill and care of the captain of another ship of the same company, or that injury by the negligence of one is an ordinary risk of the service of the other?* In some cases it might, perhaps; for example, it might if all the ships of the company were in the habit of meeting in the same dock, and the safety of each thus became, in the ordinary course of things, dependent on the skill with which the other was navigated. But, in regard to navigation on the high seas or in the estuary of the Thames, would a captain of one ship of the General Steam Navigation Company have more reason to be interested in the skill of a captain of another ship of the

company than in that of the masters of the myriad other craft in whose vicinity he might happen to navigate? By no reasonable supposition can it be imagined that he would. I think, therefore, that these two captains were not in common employment."

The reasoning in the "Petrel" case proceeds entirely upon the theory that the crew of the "Cormorant" did not assume the risk of the negligence of the crew of the "Petrel" in the particular instance then before the Court, because it was not an obvious risk or one contemplated by them at the time of their employment, but the Court decides the case upon the ground that the members of the two crews were not co-servants. It is really only a difference of words. When co-servant is used in this portion of the law of master and servant all that is meant is that the plaintiff assumed the risk of the negligence of the man who caused his injury. When it is said that the plaintiff and the other servant who was negligent were not co-servants, what is meant is that the plaintiff did not assume the risk of the negligence in question. They are in both cases really co-servants, and it may very well be that the multitude of cases and the great difference of opinion in this branch of the law is partly the result of attempting to define a master's liability by the test of who are and who are not co-servants, instead of adhering to the principle that all employed by the same master in the same business are co-servants, and that the master's liability is to be determined by the rule common to other cases of injury to workmen, viz.: whether, on the facts of each particular case, the risk of the negligence of the fellow servant had been assumed by the plaintiff or not. In other words, the criterion of liability should be the same whether a servant is injured by the explosion of a boiler or by the negligence of another servant. As was said by Lord COLONSAY in Wilson vs. Merry, L. R. 1, H. L. Sc., 326, 345: "Now, I agree with what has been said as to the terms 'fellow-workman' and 'collaborateur.' They are not expressions well suited

to indicate the relation on which the liability or non-liability of a master depends, especially with reference to the great systems of organization that now exist. And these expressions, if taken in a strict or limited sense, are calculated to mislead."

In the case at bar the plaintiff had been working for three years or more as a car repairer at Ogden City, Utah, and it was customary for him to repair, when ordered to do so, the cars lying in the yards. His duties were not limited in any way to work in the repair shops of the company (Rec., pp. 15 and 31). In the course of this work he was under cars attached to trains which were being made up and which were about to start. He was in the centre of the active operation of the road, and in a most dangerous position. He had been doing such work for three years. Is there any just ground for saying that he assumed the negligence of the car repairers in the shops, because they were in his department, but did not assume the negligence of the yardmen, switchmen and brakemen, who were making up the trains, and with whom he was brought in contract in the course of his work, and the risk from whose negligence was much more certain and obvious from the nature of their business than the risk of the negligence of other car repairers? When engaged in repairing cars in the yards, he was thrown with one as much as with the other, and, if juxtaposition is to be the test, it is certainly to be found here. Of course, physical contiguity of the servants, as it is called in the "Petrel" case *(supra)* is not a strictly accurate measure of liability. Servants may assume the risk of injury from fellow servants employed at a considerable distance. This depends upon the nature of the employment. As was suggested by Sir Francis H. Jeune: "In all cases the immediate instrument of physical injury must be contiguous to the person injured, and in most cases the person who causes physical injury is not far from the person to whom it results. But I suppose that the signalman at

one end of a rifle-range is clearly in common employment with the marker at the other when the two have a common master; and, to give a stronger instance, a servant who unskillfully packs dynamite in a factory and another who in unpacking it at a distant warehouse house is injured by its explosion, are clearly in common employment" (The Petrel, p. 325).

Though proximity of employment is not essential to the relation of co-servants, as the term is used, yet the element of proximity bears very strongly upon the question of the assumption by one servant of the risks of injury by another servant, and in nearly every case where this fact appears the servants, whether in the same department or not, are considered to have assumed the risk of injury from the negligence of those with whom they come in contact and to be co-servants within the peculiar meaning of the word.

In the Randall case, 109 U. S., 478, the brakeman of one train was injured by the engineer of another train, and it was held that the plaintiff had assumed the risk of the engineer's negligence. Mr. Justice GRAY said at page 484:

"They are employed and paid by the same master. *The duties of the two bring them to work at the same place at the same time, so that the negligence of the one in doing his work may injure the other in doing his work. Their separate services have an immediate common object, the moving of the trains. Neither works under the orders or control of the other.* Each, by entering into his contract of service, takes the risk of the negligence of the other in performing his service; and neither can maintain an action for an injury caused by such negligence against the corporation, their common master."

The plaintiff in Northern Pacific Railroad vs. Hambly, 154 U. S., 349, was a common laborer engaged in assisting to erect a culvert upon defendant's line of railroad. He was struck by the locomotive of a passing passenger train through the negligence of its engineer

and conductor. He brought suit against the railroad company and recovered a verdict. The defendant moved for a new trial, and the Judges who heard the motion were divided in opinion. The motion was denied, and the Judges certified certain questions for the opinion of this Court, among which was the following:

"Whether the plaintiff, who was a common day laborer in the employ of the defendant (which is a railroad company owning and operating a line of railroad), and who was at the time he received the injury complained of working for the defendant under the order and direction of a section 'boss' or foreman on a culvert on the line of defendant's road, was a fellow-servant with the engineer and conductor operating and conducting a passenger train on the defendant's road, in such a sense as exempted the defendant from liability for an injury inflicted upon plaintiff by and through the negligence of said conductor and engineer in moving and operating said passenger train."

This question was answered in the affirmative, the Court reaffirming its decision in the Randall case as follows:

"We think this case is indistinguishable in principle from Randall's case, which was decided in 1883, and has been accepted as a sound exposition of the law for over ten years; and that unless we are prepared to overrule that case, the third question certified must be answered in the affirmative" (p. 360).

It was also said in the same opinion by Mr. Justice BROWN at page 357:

"As a laborer upon a railroad track, either in switching trains or repairing the track, is constantly exposed to the danger of passing trains, and bound to look out for them, any negligence in the management of such trains is a risk which may or should be contemplated by him in entering upon the service of the company. This is probably the most satisfactory test of liability. If the departments of the two servants are so far separated from each other that the possibility of

coming in contact, and hence of incurring danger from the negligent performance of the duties of such other department, could not be said to be within the contemplation of the person injured, the doctrine of fellow-service should not apply."

The same idea was in the mind of BLACKBURN, J., in Morgan vs. Vale of Neath Ry. Co., 5 B. & S., 570, 580, when he said:

"I quite agree that it is necessary that the employment must be common in this sense, that the safety of the one servant must in the ordinary and natural course of things depend on the care and skill of the others. This includes almost if not every case in which the servants are employed to do joint work, but I do not think it is limited to such cases. *There are many cases where the immediate object on which the one servant is employed is very dissimilar from that on which the other is employed, and yet the risk of injury from the negligence of the one is so much a natural and necessary consequence of the employment which the other accepts, that it must be included in the risks which are to be considered in his wages. I think that whenever the employment is such as necessarily to bring the person accepting it into contact with the traffic of the line of a railway, risk of injury from the carelessness of those managing that traffic is one of the risks necessarily and naturally incident to such an employment and within the rule.*"

A very clear appreciation of this principle is found in Campbell vs. Pennsylvania R. R. Co., 2 Atl. Rep., 489. The plaintiff there was, as was the plaintiff's intestate here, a car repairer. The negligent servant was a brakeman, as he was in the case at bar. The other facts also make it practically identical with the case before us. Upon the trial a nonsuit was granted, and on appeal the judgment entered upon the nonsuit was affirmed, the Court saying at page 490:

"It clearly appears from the testimony that the immediate cause of the unfortunate accident which befell plaintiff was the negligence of the brakeman in reck-

lessly undertaking to drop in, on the track where plaintiff was working, a greater number of cars than he was able to control without assistance. *The brakeman and plaintiff were engaged in different branches of the same general service, but in the discharge of their respective duties they were brought in such close proximity to each other that the negligence of the former, in carelessly dropping in cars, necessarily endangered the safety of the latter. They were, therefore, in the proper sense of the term, fellow servants of the defendant company.*"

There is no more difference, no greater line of demarcation, between the two departments of the general service to which a car repairer and a brakeman respectively belong than there is between the steward's department and the deck department on an ocean steamer, or between the operating department of a railroad to which a conductor and an engineer are attached and the construction department in which a day laborer building a culvert is employed. No true distinction can be drawn between the Hambly case, where a man "repairing the track" was injured by the negligence of a man in the operating department of the railroad, and the present case, where a man "repairing the car on the track" was also injured by the negligence of a man in the operating department of the railroad. On the authority, therefore, of the Randall case, the Quebec Steamship case and the Hambly case, making an unbroken line of authority since the question first came before this Court, it would seem that Pool in this case assumed the risk of the negligence of Kilpatrick, for, though one was in the repair department and the other in the operating department of the railroad, they were engaged in work which had the same general purpose and were thrown together in that work, so that each was likely to be injured by the negligence of the other.

The English Courts have to a great extent followed American decisions upon this question, and the opinions of their Judges have been largely moulded by the

opinion of Chief-Justice SHAW in Farwell vs. Boston & Worcester Rd., 4 Metc., 49, which case, together with the case in South Carolina of Murray vs. So. Car. Rd. Company, 1 McMullan, 385, is the origin in this country of the principles now under discussion. Upon the immediate point involved they are in accord with the views heretofore stated.

In Morgan vs. Vale of Neath Railway Co., L. R., 1 Q. B., 149, the plaintiff was a carpenter in the employ of the defendant. At the time he was hurt he was working upon a scaffold near a turn-table. By the negligence of some porters employed by the defendant while engaged in shifting a locomotive upon the turn-table, the plaintiff was thrown from the scaffold and injured. The plaintiff was nonsuited and the judgment entered on the nonsuit was affirmed. At page 154 it was said by ERLE, C. J.:

" The plaintiff and the porters were engaged in one common employment, and were doing work for the common object of their masters, viz., fitting the line for traffic."

In Waller vs. S. E. Railway Co., 2 H. & C., 102, it was held that " a railway company is not liable for injury to the guard of a train occasioned by the negligence of the 'ganger' of the platelayers in keeping the permanent way in proper repair and condition; the two servants being engaged in one common object, viz., the safe conduct of the passengers on their journey " (Syllabus).

The plaintiff in Lovell vs. Howell, L. R. 1 C. P., Div. 161, was a licensed waterman and lighterman employed by the defendant to bring barges to and from his wharf and there moor or unmoor them. He had nothing whatever to do with the loading or unloading of the barges. While on his way to the defendant's office he was knocked down and injured by a sack of grain which another employee of the defendant engaged in unloading the barges was negligently hoisting by a crane. Suit was brought by the plaintiff

to recover damages against the defendant and the trial Judge directed a verdict for the defendant upon the ground that the plaintiff and the man hoisting the grain were fellow-servants, with leave to the plaintiff to move to enter a verdict for £150 if the Court should think the objection untenable. The motion for judgment pursuant to the leave reserved to plaintiff was denied and the rule discharged, ARCHIBALD, J., saying at page 167:

"It appears upon the evidence that, though it was no part of the plaintiff's duty to assist in the general work of the warehouse as, for example, in the raising or lowering sacks to or from the upper floors, but that his duty was confined to the care and management of the craft coming to the premises, yet it seems to have been also a part of his duty to go to the office for orders, and that in the course of this duty he would have to pass through the warehouse and out into the street by the door at which the process of lifting the sacks from the wagon was carried on, *where he would necessarily have to encounter the risk of injury from negligence of others in the same employ—one of the contemplated risks of the service.* This seems to me to bring the present case within the principle laid down in Priestly vs. Fowler and the other cases to which our attention has been drawn, and I think we should do much mischief by over-refining upon it."

In Hall vs. Johnson, 3 H. & C., 589, it was held that an "underlooker" in a mine, whose duty it is to examine the roof and prop it up, if dangerous, is a fellow-laborer with a workman in the mine, and that the latter could not recover for injury occasioned by the negligence of the former.

In Charles vs. Taylor, L. R., 3 C. P. Div., 492, the plaintiff was hired by one of the foremen of the defendant to unload a barge at defendant's wharf. While so engaged he was injured by the negligence of another employee of the defendant who was moving some barrels, and who let a barrel fall upon him. The

plaintiff had frequently been at the place when the barrels were being moved. It was held that plaintiff was a fellow-servant with the servant by whose negligence the injury happened, and therefore could not recover. BRETT, L. J., in the course of his opinion, said at page 496 :

" I shall now enunciate one principle relating to the question ; I do not say there may not be more. It is this : when the two servants are servants of the same master, and where the service of each will bring them so far to work in the same place and at the same time that the negligence of one in what he is doing, as part of the work which he is bound to do, may injure the other whilst doing the work which he is bound to do, the master is not liable to the one servant for the negligence of the other."

To the same effect are :

Priestly vs. Fowler, 3 M. & W., 1.
Bartonshill Coal Co. vs. Reid, 3 Macq., 266.
Tunney vs. Midland Rway. Co., L. R. 1, C. P. 291.
Hutchinson vs. York, Newcastle and Berwick R'way. Co., 5 Ex., 343.
Searle vs. Lindsay, 11 C. B. N. S., 429.
Feltham vs. England, 7 B. & S., 676.
Allen vs. The New Gas Co., L. R. 1 Ex. Div., 251.
Lovegrove vs. The London, Brighton, etc., R'way Co., 16 C. B. N. S., 669.
Howells vs. Landore Steel Co., L. R., 10 Q. B., 62.

In N. Y. & N. E. R. Co. vs. Hyde, 56 Fed. Rep., 188, plaintiff was employed as yard clerk, or car clerk, at the Willimantic station. In the course of his business he was injured by the backing down upon him of part of a freight train. This happened through the negligence of the engineer and train hands, who had charge of the train. Hyde then brought suit against the railroad and recovered a verdict. Upon an appeal to the Circuit Court of Appeals for the First Circuit, the judg-

ment was reversed on the authority of the Randall case, the Quebec Steamship Co. case and the Baugh case upon the ground that the plaintiff and all connected with the accident were fellow servants.

In Wolcott vs. Studebaker, 34 Fed. Rep., 8, a man employed in a carriage factory was held to be a fellow-servant with the engineer who had charge of the engine in the basement of the factory and also of the elevator boy, all three of them being in the employ of a common master.

See, also,

B. & O. Rd. Co. vs. Andrews, 50 Fed. Rep., 728.
Van Wickle vs. Manhattan Ry. Co., 32 Fed. Rep., 278.
Easton vs. Houston & T. C. Ry. Co., 32 Fed. Rep., 893.
Howard vs. D. & R. G. Ry. Co., 26 Fed. Rep., 837.

The following are cases in the State Courts in which car-repairers have been held to be co-servants with engineers, brakemen and switchmen. Their main facts are, in every instance, similar to the present case.

Besel vs. N. Y. C. & H. R. Rd. Co., 70 N. Y., 171.
Valtez vs. O. & M. Ry. Co., 85 Ill., 500.
Unfried vs. B. & O. Rd. Co., 34 W. Va., 260, 269.
Texas & P. Ry. Co. vs. Cumpston, 23 S. W. Rep., 47.
Corcoran vs. Del., L. & W. Rd. Co., 126 N. Y., 673.
Texas & Pac. R. R. Co. vs. Harrington, 62 Tex., 597.
Gilman vs. Eastern Rd. Corporation, 10 Allen, 233.
Chicago & Alton R. R. Co. vs. Murphy, 53 Ill., 336.
Peterson vs. Chicago & Northwestern R. Co. (Mich.), 31 A. & E. R. R. Cases, 292.
Kirk vs. The Railway Co., 94 N. C., 625.
Ritt's Admx. vs. L. & N. R. Co. (Kentucky), 31 A. & E. R. R. Cases, 289.

It may be argued by the defendant in error that the case of Northern Pacific Railroad Co. vs. Herbert, 116 U. S., 642, is an authority in favor of the proposition that a car repairer and a switchman are not fellow servants and the two cases of Hough vs. Railway Company, 100 U. S., 213, and U. P. Railway vs. Daniels, 152 U. S., 684, may also be cited in support of the same proposition. It will suffice to give the facts in the first case which are as follows: The plaintiff Herbert was a brakeman in the yard of the defendant. He was injured by reason of the fact that certain cars which he was braking were out of repair. The drawbar and bumper of one of the cars had been withdrawn and in consequence his leg was crushed. Herbert brought suit against the railroad company and one of the defenses was that the car was out of repair by reason of the negligence of the officer or agent of the company who was charged with the duty of keeping the cars in order and that he was a fellow servant with the plaintiff and that the latter could not therefore recover. It was held that the plaintiff could recover upon the ground that the railroad company could not delegate to another its duty to furnish safe appliances to its employees and whoever had any such duty to perform must be taken to be the company itself and his negligence to be the negligence of the company. At page 647 Mr. Justice FIELD after stating that an employee was exempt from liability for injuries to a servant, caused by the negligence of a fellow servant in a common employment, said:

"It is equally well settled, however, that it is the duty of the employer * * * to furnish sufficient and safe materials, machinery or other means by which it [the service] is to be performed, and to keep them in repair and order. This duty he cannot delegate to a servant so as to exempt himself from liability for injuries caused to another servant by its omission. Indeed, no duty required of him for the safety and protection of his servants can be transferred, so as to exoner-

ate him from such liability. The servant does not undertake to incur the risks arising from * * * defective machinery or other instruments with which he is to work."

Again at page 652:

"If, however, one was appointed by it [railroad company] charged with that duty [duty of looking after condition of cars], and the injuries resulted from his negligence in its performance, the company is liable. He was, so far as the duty is concerned, the representative of the company; his negligence was its negligence, and imposed a liability upon it."

After referring to the facts in the case the Court went on to say at page 655:

"Under these circumstances it cannot be said that the company exercised, through its officer or agent charged with that duty, ordinary care to keep the cars and brakes in good condition."

It is to be observed that the decision is not put upon the ground that the brakeman and man who should have kept the cars in repair were in different departments, and therefore not co-servants. In speaking of Hough vs. Railway Co. and Northern Pacific Railroad vs. Herbert, it was said in B. & O. R. R. vs. Baugh, 149 U. S., 368, 388, that in them "this Court recognized the master's obligation to provide reasonably suitable place and machinery, and that a failure to discharge this duty exposed him to liability to injury caused thereby to the servant, and that it was immaterial how or by whom the master discharged that duty. The liability was not made to depend in any manner upon the grade of service of a co-employee, but upon the character of the act itself, and a breach of the positive obligation of the master. In both of them the general doctrine of the master's exemption from liability for injury to one servant through the negligence of a co-employee was recognized, and it was affirmed that the servant assumed all the risks ordinarily incident to his employment."

One distinction between the Herbert case and the present case is this: In the former case the injured man was the brakeman, and the workman who caused the injury was the person who should have seen that the cars were repaired, whereas in the case before us the positions are reversed, the injured man being the car repairer and the brakeman the negligent servant. The distinction is important, and would seem to deprive the Herbert case of any bearing whatever in the present discussion, as it can hardly be said that the brakeman Kilpatrick had any duty to perform which the company could not delegate and so exonerate itself from liability, or which related in any way to the keeping of appliances in repair, or that, if he did, he was negligent in its performance.

The most that can be said of the case of Northern Pacific Railroad vs. Herbert *(supra)* is that it is an illustration of the so-called vice-principal doctrine in a modified form, which doctrine can have no application to the case at bar, as it would be difficult to maintain upon the facts before us that either Pool or Kilpatrick represented in any way with respect to each other their common master, the plaintiff in error. Neither one had any control over the other. Even if either had had control of the other it would seem unimportant, as it was said in B. & O. Rd. vs. Baugh, 149 U. S., 368, 389: "It may safely be said that this Court has never recognized the proposition that the entire control of one servant over another in doing a particular piece of work destroys the relation of fellow-servants."

The Court in the Herbert case was divided in its opinion, and it is of interest that the law in England appears to be the other way (see Searle vs. Lindsay, 11 C. B., N. S., 429; Lovegrove vs. The London, Brighton and South Coast Rway. Co., 16 C. B., N. S., 669).

From the foregoing review of authorities it is apparent that in this Court, in the lower Federal courts,

in England and in many of the States no exception is recognized to the rule that all servants employed by the same master in the same general service are co-servants, and that each is presumed to assume the ordinary risks incident to his employment, among which are the risk of injury from the negligence of his fellow-servants, and that the only test as to the liablility or non-liability of a master when a workman employed by him is injured by the negligence of another of his workmen in the same common employment is whether the man who was hurt assumed the risk of the negligence which injured him. If he did, then he cannot recover from his employer. If he did not, then he can. The liability of the master is, however, not affected in any way by the question of whether the man guilty of the negligence was or was not in the same department with the injured man, nor whether he was a so-called vice-principal or *alter ego* of the master.

Pool and Kilpatrick were both employed by the same master, viz., the Southern Pacific Company. Kilpatrick was employed as a brakeman or a switchman in the yard at Ogden City (Rec., p. 17). His duties were that of an ordinary yard switchman ; that is, the making up of trains going out and similar work. Pool was employed as a car repairer to work in the same place that Kilpatrick did ; *i. e.*, in the yard at Ogden City (Rec., 15 & 31). He had been working there and in the shops at Ogden City for three years or more. At the time of the accident Pool was repairing the train which was about to leave, and Kilpatrick was making it up. Adopting the formula of BRETT, L. J., in Charles vs. Taylor *(supra)*, Pool and Kilpatrick were servants of the same master, and the service of each brought them so far to work in the same place and at the same time that the negligence of the one in what he was doing as part of the work which he was bound to do might injure the other while doing the work which he was bound to do, and that, therefore, the master was

not liable to Pool for the negligence of Kilpatrick. In other words, Pool, when he entered the service of the Southern Pacific Company, assumed the risk of being injured by the negligence of Kilpatrick, and his widow cannot recover any damages from the plaintiff in error by reason of the injury from which he died.

Point II.

THE ONLY INFERENCE TO BE DRAWN FROM THE EVIDENCE IS THAT THE ACCIDENT WAS CAUSED BY THE NEGLIGENCE OF RICE, ANOTHER CAR REPAIRER, AND NOT BY THE NEGLIGENCE OF KILPATRICK. POOL AND RICE, BEING CAR REPAIRERS, WERE OF COURSE FELLOW SERVANTS.

A careful reading of the testimony of Fowers, the principal witness for the plaintiff, and of Rice would seem to show that Kilpatrick never knew that Pool and Fowers were under the car, and never heard what Rice told him. Kilpatrick was not examined by the plaintiff, and this fact is of some bearing and importance in the consideration of this point.

Fowers says, at page 11 of the record:

"Mr. Rice was standing outside of the car, and I says to him, says I: You go and stop him, and don't let them hit this car at all, and told him that it could not get out on the train until it was repaired. Of course they could not make up the train until that car was repaired, and says I: Don't let them hit the car at all, and we will have it done in five minutes. Says he, All right, and stepped down to the other end of the car, and I saw him signal for the engineer to stop, making the regular signal with his arm to them coming up.

"Q. What did he say right there—what, if anything, did he say at that time?

"A. He didn't say anything at that time--he stood

and signaled. I was standing right at the end of the car still looking down and saw Mr. Pool leaning back over the rail this way—about in that position, looking back at the engine coming. They came up very slow within about six feet of the car that he was working under, and then came to a stop. I heard Mr. Rice tell somebody not to hit the car, that they were working there. As soon as I heard him say that, I just went right to work and jumped right under the car again with Mr. Pool and he turned his attention right to the work, and we went to work again."

Again Fowers says at page 17 :

" Q. But you think it was Ben Kilpatrick who signaled the engineer to back back ?

" A. Yes, sir.

" Q. And struck this car ?

" A. Yes, sir.

" Q. *And he did that after he had been warned by Mr. Rice ?*

" A. *Well, I suppose—*

" Q. *Well, after you heard Mr. Rice tell him—*

" A. *Yes, sir.*

" Q. He done that after he had been told by Mr. Rice not to hit the car ?

" A. Yes, sir."

After considerable pressing by counsel, Fowers testifies, at pages 22 and 23 of the record :

" Mr. Allison : I understand you to say it was about twenty feet to where Kilpatrick was ?

" A. Yes, sir ; when Mr. Rice spoke to him.

" Q. Did you see Kilpatrick when he spoke to him ?

" A. Yes, sir.

" Q. Were you so you could see him ?

" A. Yes, sir.

" Q. Well, did he hear him—are you able to say that he heard him ?

" A. Well, I heard Mr. Kilpatrick make some reply, but I don't know what it was.

" Q. He replied, did he, when Rice spoke ?

" A. Yes, sir.

" Q. This was the time the engine was standing still ?

" A. No, sir ; she was moving then, and came up within about six feet and then stopped. She was stopped at the time—"

It is to be noticed that Fowers cannot say what reply was made to Rice by Kilpatrick or whether Kilpatrick understood Rice's warning. As far as the testimony shows everything went on as if Rice had never said a word. Usually when a car is to be coupled to a train it is stopped six feet or so from where the train is standing, and the signal is then given by the brakeman to back the car down. This is exactly what was done by Kilpatrick. Especially is this so when the brakeman is riding upon the car which is to be attached to the train, as in this case. Upon this point Rice says, at pages 25 and 26 of the record :

" Q. Did you see Kilpatrick at that time ?

" A. Not until the switchman came down with the caboose.

" Q. What was he doing when you saw him ?

" A. *Mr. Kilpatrick was riding on the steps on the forepart of the caboose, I think.*

" Q. Well, later on, what was he doing about the switch, if anything ?

" A. Well, I didn't see him at the switch.

" Q. Well, did you have any conversation with. Mr Kilpatrick or Mr. Taylor in relation to those parties under the car ?

" Q. What, if any, conversation did you have with Mr. Kilpatrick ?

" A. I had no conversation with Mr. Taylor, if that is his name ; I don't know him. There was two switchmen, I didn't know the names. I had no conversation with Mr. Taylor. I had had no conversation any further than to tell Mr. Kilpatrick not to come up to touch the cars ; there were men working under the car.

" Q. *How far was he from you at that time ?*

" A. *Well, it was twenty or thirty feet at the time I told him this.*

" Q. Where was he at that time ?

" A. He was on the west of the caboose.

" Q. Where were those switchmen ?

" A. Well, the engine had just got the cars switched—well, a little farther.

" Q. Now, then, you told him that; what did you see, if anything, him do ?

" A. *Well, I saw him do nothing more until the engine and caboose stopped within six feet of this freight car that they were working on, when it stopped still; the next signal was Mr. Kilpatrick gave a motion.*

" Q. *What was that ?*

" A. *For it to come back, and it came back with great force;* and at that time I heard Mr. Fowers holler, ' Pull up.' I run back to where Mr. Fowers was. He was at the other end of the car, where he was at work previous to my going up and notifying him not to come down ; and I saw Mr. Pool in between the cars and we yelled for help."

Rice says nothing from which it can be inferred that Kilpatrick heard what he said and his description of the attendant circumstances discloses no act on the part of Kilpatrick to show that he knew that Pool and Fowers were under the car, or that he acted differently from what he would have done if Rice had not uttered a word of warning. It is to be remembered that the curve was such that Kilpatrick could not see Fowers when he stepped out from the car when he first apprehended danger, and that Pool didn't step out at all, and it might very well be that Kilpatrick supposed Rice was the only car repairer there. Fowers was asked, at page 15 of the Record, " Could the engineer see you from where he was, out on the engine ? Could he see you were in there with the caboose and car between you ? Ans. No, sir."

It is inconceivable that Kilpatrick did know that these car repairers were under the car, and notwith-

standing that knowledge signaled the engineer to back the caboose against it. We cannot but agree with the views expressed in the dissenting opinion in the Supreme Court of Utah, when BLACKBURN, J., said, at page 50 of the record :

"I think in this case the jury wholly misconceived the force and effect of the evidence. It was all given in behalf of the plaintiff. * * * Rice says he told Kilpatrick, the switchman, who was controlling the engineer running the engine, not to touch the car ; the decedent was at work under it ; that Kilpatrick was 20 or 30 feet away ; *he does not say that Kilpatrick heard him ; indeed he was not asked that question.* If Kilpatrick heard the warning and notwithstanding signaled the engineer to move back, his act was more than negligence—it was malice and murder. *We cannot think that Kilpatrick heard the warning. We are not ready to presume him guilty of deliberately killing the decedent. Rice must have failed to make Kilpatrick hear and understand him.* If so, Rice's negligence contributed to the injury and the defendant was not guilty of negligence through Kilpatrick, and the plaintiff cannot recover."

If therefore there is no evidence from which the jury could properly infer that Kilpatrick understood Rice, then the question should not have been left to them as to whether the former was negligent or not. There being no evidence that Kilpatrick did understand Rice, then the negligence which caused Pool's death was that of Rice in not seeing to it that Kilpatrick understood him, as he had been asked by Pool's associate to do this very thing and had undertaken to do it. It is not enough to show that Rice called to Kilpatrick in order to make the latter negligent. It must be proved that Kilpatrick heard and understood what was said to him by Rice. Rice and Pool were both car repairers, and therefore fellow-servants, and the plaintiff in error is exempt from liability for the death of Pool by the negligence of Rice, and its motion for a nonsuit should have been granted.

Point III.

THE PLAINTIFF'S INTESTATE WAS GUILTY OF CONTRIBUTORY NEGLIGENCE.

The evidence of the plaintiff's witnesses clearly shows, and is undisputed, that Pool did not put out a red flag. Fowers was cross-examined as to this, and said at page 16:

"Q. *Mr. Fowers, couldn't you have—couldn't you and Mr. Pool have put a red flag out there, that would have notified—put up a red flag or some other flag that would have notified the engineer of danger?*

"A. *Yes, sir.*

"Q. *Why didn't you put up a flag?*

"A. *Because it was too big a work.*

"Q. *Because it was too much work?*

"A. *Yes, sir.*

"Q. You thought it would take only a few minutes before you got through?

"A. Yes, sir. We also knew that we had a man stationed there to watch for us, and considered ourselves safe.

"Q. Who was the man you had stationed there to watch for you?

"A. Mr. Rice—Mr. George Rice.

"Q. And you considered you were all right with Mr. Rice to watch for you?

"A. Yes, sir.

"Q. Who was Mr. Rice?

"A. He was a car laborer from the shop.

"Q. Was he one of your car repairers?

"A. Yes, sir."

Pool knew the nature of the work he was doing and had been employed in it for three years. He knew that the train to which the car he was under was attached was ready to go out, and that it was about time for it to leave. He was fully aware of the danger

of his position and made up his mind to take his chances, as it was too much trouble to get a flag and set it up to show that he was under the car. He preferred to trust to Rice. He could have had a flag if he had chosen to get it. It was no fault of the railroad company that he didn't have one. The only inference from the evidence is that the railroad furnished him with one, but that he was too lazy to use it. There is at least no evidence that the railroad did not furnish flags to the car repairers. Even if the railroad had not done so, it would seem to be immaterial, under the facts of this particular case as it was held by Mr. Justice BREWER in O'Rorke vs. Union Pac. Ry. Co., 22 Fed. Rep., 189, that,

"Where a railroad company calls upon an employee to go under a car on a side track, on which other cars are liable to be moved or switched, to repair such car, it is its duty to provide him with a red flag as a danger signal; but if the employee is an old railroad man and fully aware of the danger, and has continued for months to perform such duties and neglected to demand and procure a flag, he may be considered as having waived his right to recover for any injury received in consequence of such neglect" (Syllabus).

Failure to hang out a red flag or to see to it that one was hung out when he first began his work made Pool guilty of negligence which contributed to the accident to him; but, when he discovered the extreme peril of his position and did not then take the usual measures for his safety, his contributory negligence was vastly increased. He knew that the caboose was within six feet of the car he was under. He knew that it was the intention of the engineer and of Kilpatrick to couple the caboose to the car he was repairing. He knew that the engineer and Kilpatrick hadn't seen him, because he had not come out from under the car. He knew that he had no signal up. Knowing all these things, he took the chances of Rice having been understood by a man thirty feet away upon or near a moving car. It would seem diffi-

cult to imagine a situation more calculated to impress upon Pool the danger of his position. He could not fail to have appreciated it, and to have made up his mind to take the risk and trust to fortune. As Judge BLACKBURN expressed it at page 50 of the record:

"In all human probability the accident would not *have* happened if the red flag had been put up. The engineer would have seen it, and not have obeyed the signal of the switchman. The switchman would have seen it and not have given the signal to back up.

"By entrusting their safety to Rice they took the chances of his carelessness in giving the proper information to the switchman and the chances of the switchman hearing and understanding Rice. Their safety would have been certain if the flag had been hung out. It was a mute and silent warning, but neither switchman nor engineer could have mistaken it, nor would they have disobeyed it.

"I think, therefore, as a matter of law, that the decedent by neglecting to use the well-known signal, the usual and well-understood precaution, and trusting to the chance of a fellow servant protecting him was contributory negligence on his part, and the plaintiff cannot recover. * * *

"Railroad employees may not at their pleasure set aside the rules and precautions made by the company for their protection and substitute others without assuming all the risks consequent upon such substitution."

To adopt the formula so often used by this Court Pool's "Recklessness could hardly go further. The evidence would warrant no other conclusion than that he took the risk of the work in which he was employed and that his negligence in the course of that work was the direct cause of his death. The Court should have directed a verdict for the defendant" (Southern Pac. Co. vs. Seley, 152 U. S., 145, 156).

Point IV.

IT WAS ERROR ON THE PART OF THE TRIAL JUDGE TO CHARGE THE JURY THAT IN DETERMINING THE QUESTION OF DAMAGES THEY SHOULD " DETERMINE IN THE FIRST PLACE THE NUMBER OF THE FAMILY, THE NUMBER OF CHILDREN AND AGES OF THE FAMILY " OF THE DECEASED.

When one man by negligence kills another the law requires that he shall make reparation in damages. He must make good the life he has destroyed, as far as it lies in his power, and give to the dead man's estate the amount which the latter would probably have earned if he had died a natural death.

This principle is as old as the civil law, and was stated by Grotius in the following words:

" He that kills a man unjustly is bound to pay physicians and surgeons, if any be made use of, and to make such reparation to those whom the deceased person was obliged in duty to maintain, such as parents, wife, children, as the hope of that maintenance (regard being had to the age of the deceased) amounted to" (Grotius on War and Peace, Bk. II., Ch. 17, Sec. 13).

There are certain facts which tend to show the worth of a man's life. Chief among these are the amount he earned at his death, the length of time he would in the ordinary course of events have lived and the cost of his living expenses. The latter deducted from the former gives as nearly as it can be arrived at, the cash value of a man's life, and this alone is what the law says the negligent man shall give to make restitution for the life he has destroyed.

As was said in Penna. Rd. Co. vs. McCloskey's Administrator, 23 Pa. St., 526, 530, the damages " must necessarily be measured by the absolute value of the life lost, and not by the pecuniary loss which the designated representatives shall have thereby sustained.

The precept involved in the law is, 'Thou shalt not by negligence or violence take away the life of another;' *and the sanction of the law lies in the duty of compensation for the life destroyed, measured according to its own merits, and not according to the necessities and circumstances of his kindred.*"

In Railroad Company vs. Barron, 5 Wall., 90, 105, the case was brought under an Illinois statute, which was in all material points the same as the Utah law and the principle which should govern the estimation of the damages was there declared to be as follows:

"If the person injured had survived and recovered he would have added so much to his personal estate, which the law on his death, if intestate, would have passed to his wife and next of kin; in case of his death by the injury the equivalent is given by a suit in the name of his representative."

Any other rule would seem difficult of application and would open too wide the door to speculation by the jury. If then the actual probable earning capacity of Pool, less his own probable cost of living, is the true measure of the damages which his next of kin are entitled to recover from the plaintiff in error, admitting for the moment that the latter was negligent, it is not very apparent what bearing the age and number of Pool's children can have upon this question. The point always is what the man killed actually earned and gave to his family, and not what he ought to have earned, because he had so many children dependent upon him.

In Pennsylvania Co. vs. Roy, 102 U. S. 451, the plaintiff, who had received personal injuries while traveling, brought suit against the railroad company, and upon the trial of the case was allowed to give, against the objection of the defendant, the number and age of his children. This was held error by this Court, and for this error alone the judgment was reversed, Mr. Justice HARLAN saying at page 459:

"There was, however, an error committed upon the trial, to which exception was duly taken, but which

does not seem to have been remedied by any portion of the charge appearing in the bill of exceptions. The plaintiff was permitted, against the objection of the defendant, to give the number and ages of his children—a son ten years of age, and three daughters of the ages, respectively, of fourteen, seventeen and twenty-one. This evidence does not appear to have been withdrawn from the consideration of the jury. It certainly had no legitimate bearing upon any issue in the case. The manifest object of its introduction was to inform the jury that the plaintiff had infant children dependent upon him for support, and consequently that his injuries involved the comfort of his family. This proof, in connection with the impairment of his ability to earn money, was well calculated to arouse the sympathies of the jury, and to enhance the damages beyond the amount which the law permitted; that is, beyond what was, under all the circumstances, a fair and just compensation to the person suing for the injuries received by him. How far the assessment of damages was controlled by this evidence as to the plaintiff's family it is impossible to determine with absolute certainty; but the reasonable presumption is that it had some influence upon the verdict."

It would seem impossible to distinguish in principle the Roy case from the case at bar. The distinction that the injured man in the former was plaintiff, while in the latter the plaintiff is the widow of the man who was hurt, would seem immaterial. In the Roy case the objection was made to the introduction of the evidence, while in the case at bar the objection was made to the Judge's charge, the evidence as to the number of the children being already in the case without objection. This difference would also seem to be immaterial. The evidence as to the number of the children of the deceased was properly admissible in the case before us for the purpose of showing that there were parties entitled to recover a verdict under the provisions of the Utah Statutes, and could not have been excluded

upon objection by the defendant below. The admission, however, of evidence to show that there are parties entitled to any recovery that may be had does not make such evidence admissible as to the extent and amount of such recovery, nor does such admission of evidence make it proper for the Judge to charge the jury that they may make use of such evidence in determining the amount of the damages which the plaintiff should recover.

The Utah Statutes provide as follows (2 Comp. Laws of Utah, 1888):

"§ 2961. Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if the death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the company or corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

Section 2962, Compiled Laws, reads as follows: "That every such action shall be brought by and in the name of the personal representatives of such deceased person, and the amount received in every such action shall be distributed by direction and decree of the proper probate court to such persons (other than creditors) as are by law entitled to distributive shares of the estate of such deceased person and in such proportions as are prescribed by law." * * * "That the damages so recovered shall not in any sense exceed the sum of ten thousand dollars."

Sec. 3179, Comp. Laws, 1888, reads as follows: "When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is re-

sponsible for his conduct, then also against such other person. In every action under this and the preceding section such damages may be given as under all the circumstances of the case may be just."

In the Roy case the question was as to what pecuniary damage the plaintiff had suffered, and it was held that the number and age of his children had nothing to do with it, and that evidence thereof was inadmissible. In the present case the jury were told in determining the pecuniary value of the injured man's life to first determine the number and age of his children; that is, to take those facts into consideration. If the Roy case correctly states the law, then the Judge's charge in the case at bar would seem to have been error. The jury were told that they could make use of certain evidence in a case for a purpose for which similar evidence in a similar case was held inadmissible. The evidence as to the age and number of the children of plaintiff's intestate was of course not objected to because it was properly admitted for a certain purpose, but the fact that it was in the case did not justify the Judge in instructing the jury to make use of it for a purpose which was clearly improper.

The charge of the Judge upon this point was as follows (Rec., p. 38):

"But, passing that also in favor of the plaintiff, then you will come to the question of damages, as to what damages the plaintiff should recover in this case for the loss that has been sustained. And in determining that question, you should consider it purely as a business question and in a pecuniary sense, and determine, as nearly as you can, in a business way, and in a pecuniary sense, what loss this family has sustained by the loss that has occurred to them by this accident. *Determine, in the first place, the number of the family, the number of children and ages of the family*, and determine the age of the deceased, his ability to earn wages and provide for the family, determine from your own experience. You can judge as to what his expectancy

may have been ; and from all these circumstances, determine what, in a pecuniary sense, this family has lost by the loss of the husband and the father ; the care he may have given those children, and determine it in a business way, and without sentiment, just how much in a pecuniary sense, they ought to recover for the injury that they have sustained."

It may be argued that the defendant in error was only the trustee under § 2962 of the Laws of Utah *(supra)* for the benefit of those beneficially entitled to the amount recovered, and that it was necessary for the jury to know and determine whether there were any beneficiaries, and that this was practically all that was meant by this portion of the Judge's charge. It may very well be that the jury must ascertain whether the deceased left some one of the persons entitled to the benefit of the action, and that unless it is shown that some such person survived the action cannot be maintained. It was for this purpose that the evidence as to the age and number of the children of plaintiff's intestate was admitted in this case. Under a statute similar to the Utah law such evidence for such a purpose was held proper (Breckenfelder vs. Railway Co., 79 Mich., 560). No exception was or could properly have been taken to the introduction of this evidence, and no valid exception could, perhaps, have been taken if the Judge had charged the jury to determine from the evidence whether there were any persons who were entitled to take any recovery which might be had. There was no dispute as to this, and the jury on the evidence could find but one way, but no objection could have been made to any such charge in this case. The point is, was that this charge? Is it possible that when the Judge said "then you will come to the question of damages * * * and in determining that question * * * determine in the first place the number of the family, the number of children and ages of the family" (Rec., p. 38), he meant to be understood as saying, "then you will come to the ques-

tion of whether there is anybody entitled to damages if you award them." If we are to twist the words of the Judge out of their ordinary meaning, yet how is it to be explained that he asks the jury to consider the "ages of the family." That certainly has nothing to do with the existence or non-existence of beneficiaries. Such a construction of this portion of the charge would seem too forced, and the only conclusion to be reached from reading it would appear to be that the trial Court had lost sight of the principle that the damages to be given should represent the earning capacity of the deceased and not the needs of his family, and that it could in no way properly affect the amount of the verdict of the jury whether the plaintiff's intestate had so many children that he didn't know what to do, or had no children at all. The position of the defendant in error appears to be that a Judge can, because evidence is properly in a case for a specific purpose, direct a jury to consider that evidence in a way and for a purpose for which it would be clearly inadmissible. No argument would seem necessary to show the absurdity of such a proposition.

The doctrine that the only measure of damages recoverable in a case of this nature is the value of the life destroyed and that the age and number of the children of the deceased have no bearing upon this point is followed in the case of Kessler vs. Smith, 66 N. C., 154, in which the plaintiff brought suit for the unlawful killng of his intestate by the defendant and offered to show upon the trial the number of the deceased's family at the time of his death ; this evidence was objected to by the defendant, but admitted by the Court. On appeal this was held error; the Court saying at page 157 :

" We were informed upon the argument, that the idea was, that the condition and number of the family of the deceased, ought to affect the damages, inasmuch as it required more to support a large family than a small one, and that if two men were killed, of precisely the

same capacity for labor, and of the same occupation and thrift, and one left a family of ten, and the other of five, the large family would be entitled to as much again as the small.

" This would be so if the necessities of the family and not the value of the life of the deceased were the rule. But we have seen that is not the rule. If a man's net earnings are but $100 per annum, that is his pecuniary value to his family, whether large or small."

In Beems, Admin., vs. The C., R. I. & P. R. Co., 10 Amer. & Eng. R. R. Cases (Iowa), 658, evidence was admitted upon the trial showing the number of the family of plaintiff's intestate. The judgment recovered by the plaintiff was reversed upon the sole ground that such evidence was inadmissible. On this point the Court say at page 664:

" Observation and experience do not teach that one's income is likely to increase in the same ratio as the number of his children. There is no rule of law under which the estate of a deceased father of a dozen children can properly recover on account of his death more than the estate of such a father of one child or of none. The real question in this case is, What was the value of the deceased's life to his estate? The number of his children can have no legitimate bearing upon that question, although it may furnish the ground of an earnest appeal to the sympathy of the jury, and we have no doubt that that is the real purpose for which such testimony is offered."

It is to be observed that the statute giving the right of action in each of the cases just referred to was not similar to the Utah statutes governing this case, and that it was not necessary in them to show that there were parties entitled to any recovery which might be had, and that, therefore, the evidence was not offered for such a purpose, but only as a measure of damages.

The proper measure of damages in cases brought under statutes like the provisions of the laws of Utah before cited would seem to be that stated in Howard

vs. Delaware & H. Canal Co., 40 Fed. Rep., 195, in which case it was held that the plaintiff could only recover nominal damages for the reason that it was shown upon the trial that the deceased had no earning capacity whatever, and that, therefore, his next of kin had not suffered any loss or damage by his death. The case was tried by the Court upon a waiver in writing of a trial by jury, and it was said in the course of the opinion at page 198 :

" The pecuniary injury resulting from the death is the loss of what the deceased would probably have accumulated afterwards if he had lived. In this case the deceased had accumulated nothing for any one up to the time of his death in middle life. He was no more likely to accumulate property from then forward than before. *The deprivation of his society, affection or counsel is not to be considered. The actual probable pecuniary loss is all that the statute covers and can be allowed for.* Upon the evidence, considering all the probabilities of his future, no just ground for finding that he would ever have accumulated any property for his brothers and sisters is apparent."

In Serensen vs. Northern Pac. R. Co., 45 Fed. Rep., 407, 411, it was said, " that there must be some evidence showing that had the deceased lived there would have accrued to the next of kin some property, or there was a strong probability he would or might have been of some pecuniary benefit to them. Nothing is allowed simply for the death of the deceased, separated from the pecuniary loss his widow or next of kin may suffer on account thereof."

See, also, Hogue vs. Chicago & A. R. Co., 32 Fed. Rep., 365, 368.

In view of the fact that this case comes from Utah, where formerly the number of a man's children was unlimited, it would seem that the argument contained in the brief of the plaintiff in error in the Supreme

Court of Utah was not without force. It was as follows:

"How manifestly unjust such a measure of damage must necessarily be seems to us too clear for argument. Had it been our client's misfortune to have killed the late Brigham Young, with his seventeen wives, forty-eight children, and his innumerable grandchildren, the entire properties of the defendant could have scarcely responded to the verdict of a sympathetic jury, under this humane instruction of the learned Judge, and the many widows and numerous offspring requiring the care, support and protection of the deceased husband and father, would have appealed with much persuasive eloquence to the feelings of a listening and responsive Utah jury."

That this charge was "calculated to arouse the sympathies of the jury" (Roy Case, *supra*), and did arouse their sympathy, is very evident from the verdict itself. The plaintiff's intestate was earning $57.50 a month (Rec., p. 7). Out of this his own living expenses had to be paid, so that at the best his family could not have received for their benefit more than $40 a month or $480 a year. The jury, however, gave to them $10,000, the limit permitted by law, as representing the value of a dead man's life. The legal rate of interest in Utah is 10 per cent. (Compiled Laws of Utah, § 2119), and the $10,000 invested at that rate would have given to the family of the deceased more than twice the amount they would have had if Pool had not been killed. As Mr. Justice HARLAN says in the Roy case *mutatis mutandis*: "How far the assessment of damages was controlled by this *portion of the charge* as to the plaintiff's family it is impossible to determine with absolute certainty; but the reasonable presumption is that it had some influence upon the jury."

Point V.

THE JUDGMENT OF THE SUPREME COURT OF UTAH TERRITORY AFFIRMING THE JUDGMENT OF THE COURT BELOW IN FAVOR OF THE PLAINTIFF AND THE ORDER DENYING THE MOTION FOR A NEW TRIAL SHOULD BE REVERSED AND A NEW TRIAL ORDERED.

MAXWELL EVARTS,
Of Counsel for Plaintiff in Error.

Office Supreme Court, U. S.
FILED.
JAN 9 1895
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

October Term, 1894.

THE LAW ASSOCIATION OF PHILADELPHIA.

THE SOUTHERN PACIFIC CO.,
Plaintiff in Error,

vs.

MALOLA POOL,
Administratrix of Joseph Pool, deceased,
Defendant in Error.

No. 152.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

BRIEF FOR DEFENDANT IN ERROR,

By SAMUEL SHELLABARGER and
JEREMIAH M. WILSON.

McGILL & WALLACE, Law Printers, Washington, D. C.

IN THE

Supreme Court of the United States.

THE SOUTHERN PACIFIC COMPANY, Plaintiff in Error,

vs.

MALOLA POOL, Administratrix of Joseph Pool, Deceased, Defendant in Error.

No. 152.

In Error to the Supreme Court of the Territory of Utah.

BRIEF FOR DEFENDANT IN ERROR.

As this brief is prepared in the absence of any brief filed in this court in behalf of the plaintiff in error, we deem it proper, in so far as we think it necessary to notice them at all, to consider the questions raised by the assignment of errors, as found in the Record, at pages 52 and 53, in the order in which they are there set forth.

Damages.

The first of these assignments of error is "excessive damages, appearing to have been given under the influence of passion or prejudice."

The answers to this assignment are:

1. The action is one brought under the statute of Utah, which is substantially a re-enactment of Lord Campbell's act. Sections 2962 and 3179 are set out in the opinion of the Supreme Court of Utah (*R., p. 47*), and, therefore, need not be here repeated.

An inspection of the cases arising under acts analogous to Lord Campbell's act will show multitudes of such cases where the courts have sustained verdicts in which damages were allowed quite as large, considering all the conditions of the case, as were allowed in the present case.

In *Railway Co.* v. *Lemberg* (75 Texas, 61), a verdict for $10,000 was held not excessive, nor to be set aside, where the deceased was shown to have been a "stout, healthy, "and sober laborer, about 35 years old, earning $1.25 a day," and that he left a widow and two infant children.

So in *Railway Co.* v. *Geiger* (79 Texas, 13), where the deceased was shown to have been healthy and robust, 29 years old, and an engineer, earning $125 a month.

In the case at bar, the deceased was a young man, 29 years of age, of good habits, never drank or went away from home; was very ambitious to work; was then earning $57.50 a month; left two infant children; his wages had been recently advanced, and he had all the prospects of a young, healthy, sober, industrious, and ambitious man to receive greatly increased earnings. (*R., p. 7.*) In favor of such a man, the statute, in allowing $10,000, virtually *legalizes* that amount of recovery, because he belonged to the best possible class.

2. There is no fact disclosed by the Record showing any bias, prejudice, misbehavior, or other objectionable thing, on the part of the jury, or any member thereof, unless it be in the naked fact of the amount of the verdict rendered.

It is a universal principle and rule, applicable to this matter, that jurors are *presumed* to have conducted them-

selves properly until the contrary is shown; and to overthrow this presumption there must be some direct, positive testimony tending to show misconduct on the part of the jury.

See *People* v. *Williams*, 24 Cal., 31;
Parshall v. *Railroad Co.*, 35 Fed. Rep., 649;
Matlico v. *The State*, 18 Ga., 434.

In the above-cited case of *Parshall* v. *Railroad Co.* (35 Fed. Rep., 651–2), in the opinion, by Justice Brewer, the said principle is, in substance, held.

The rule in regard to setting aside a verdict on the ground of excessive damages is thus stated in *Farman* v. *Lauman* (73 Ind., 368):

"Courts should not interfere with the verdict of a jury on the ground of excessive damages unless such damages are so great as to appear outrageous, or such as to induce the belief that the award was the result of passion or prejudice, and not the conclusion of deliberate judgment."

See, also, the case of *Daniels* v. *Union Pacific Railway Co.* (23 Pacific R., 762), decided in 1890. There the damages allowed were $10,000, the same as in the case at bar. In refusing to disturb the verdict, the court thus comments on the facts showing the damages:

"The respondent was lamed and deformed in one leg for life, and permanently disabled in one shoulder, so that he was rendered wholly unable to perform manual labor. He was rendered entirely helpless by the accident. He was neglected for two days before his wounds were dressed," etc.

The same doctrine is asserted in an infinite number of cases, unnecessary to be here cited.

3. But, wholly aside from these suggestions, this assignment is not available in this court, because the granting or refusing of a motion for a new trial is always addressed

to the discretion of the trial court, and can not be reviewed by an appellate court.

The cases in which this is held are simply and literally innumerable, and are uniform. Take, for example, the case of *Railroad Co.* v. *Struble* (109 U. S., 381–4–5), where at the end of the opinion, the court says:

"It is assigned for error that the court overruled the defendants' motion for a new trial. A large part of the printed argument on behalf of the defendants is devoted to a discussion of the grounds assigned in support of a motion for a new trial. But the action of the court below in refusing a new trial is not subject to review here. This has long been settled by the decisions of this court."

Citing—

Railroad Co. v. *Fraloff*, 100 U. S., 24;
Railroad v. *McDaniels*, 107 U. S., 454.

In *Kennon* v. *Gilmer* (131 U. S., 29), this court repeats this doctrine, as follows:

"But this court has no authority to pass upon any question of fact involved in the consideration of a motion for a new trial."

In said case of *Railroad Co.* v. *McDaniels* (107 U. S., 454–6), the court says:

"That we are without authority to disturb the judgment upon the ground that *the damages are excessive* can not be doubted. Whether the order overruling a motion for a new trial, based upon *that* ground, was erroneous or not, our power is restricted to the determination of questions of law arising upon the Record."

Negligence and Contributory Negligence.

Three specifications of error are given under the second assignment (*R., p. 53*), to wit, (A) that the evidence fails to show any fault or negligence on the part of the defendant: (B), that it shows contributory negligence on the part of the plaintiff's intestate in not placing a red flag in front of the car when he was at work as a signal of danger, and in not seeing that the engineer of the switch engine was notified of his presence under the car; and, (C), that the evidence shows that the only negligence, other than Pool's, that occasioned the accident, if any such there was, was that of the switchman, Kilpatrick, a fellow-servant of the intestate.

As to these specifications, "A" and "B," it is proper, but not essential, owing to the legal effects of the verdicts, to notice that the evidence in the case which shows the deceased was ordered, by his superior, to do the work in which he was engaged (*R., fols. 20–1*); that the place and manner in which the repairs were being made by the deceased was the usual and proper place and manner (*R., fols. 30, 62*); that it was necessary for the deceased to take the position which he did take in making the repairs (*R., fols. 21–2–3, 40–1*); that they had a very short time before the car being repaired must depart in which to make said repairs (*R., fol. 21*); that, while so engaged in the repairs, Rice (one of the car repairers) stood near the car being repaired at the time the approach of an engine was heard by the parties making the repairs (*R., fol. 23*); that Fowers, the party engaged with the deceased in making said repairs, requested Rice to give to the engineer and switchman on said approaching engine the signal to stop. (*R., fols. 23, 33, 51–2.*) This Rice did immediately. (*R., fols. 23, 45–6, 51–2.*)

Rice informed the switchman that men were engaged under said car in repairing it. (*R., fols. 23, 31–3, 45, 51.*) His communication was received by the switchman, understood, replied to, and complied with. (*R., fols. 23, 45, 52.*) Up to this time Fowers and the deceased had taken every precaution to avoid injury. (*R., fols. 22–3.*) When the engine stopped, as it did about six feet from the car being repaired (*R., fols. 23, 52*), Fowers and the deceased assumed, and were entitled to assume, that there would be no danger in proceeding to work again. (*R., fols. 23–4, 36.*) In a very short time after the engine was so stopped, the switchman, Kilpatrick, gave the engineer a signal to back up. (*R., fols. 23–4, 34, 46, 52.*) In response to the signal the engineer immediately backed up with great force (*R., fols. 23–5, 46, 52–6*), and Joseph Pool, plaintiff's intestate, was instantly killed. (*R., fols. 26–7–8.*) Fowers' uncontradicted testimony is that "we knew we had a man standing there to watch for us, and considered ourselves safe." (*R., fols. 31–2.*) Rice, the party who stood there to watch, did his whole duty. (*R., fols. 23, 31–3, 51–2.*)

The effect of this testimony is to show that the deceased and his fellow-servants, Rice and Fowers, did take the precaution of "setting a watch" to prevent the engine from coming against the car being repaired; that that watchman, Rice, did notify the engineer and switchman to stop the engine and not to come against the said car; that this notification was heard and obeyed, and that the engine *was stopped six feet from the car being repaired;* that the engine suddenly and quickly started again, and came against the car being repaired, without any reason, and under conditions in which the deceased had no right to expect that this would happen, and that the repairs being done were necessary to be done, and in a very short time.

We adopt, as part of this brief, the clear statement of

these conditions found in the opinion of the Supreme Court of Utah, by Miner, J., at pages 44 and 45, folios 91 to 94 of the Record. The Supreme Court below is right in stating, as it does (*R., p. 44*), that the facts there recited are "*undisputed;*" because the defendant did not examine any witnesses, not even the yard switchman, Kilpatrick, who so murderously started the engine after it had been stopped, and after he was notified that men were working under the car where the deceased was killed, and the court below calls attention to the fact that Kilpatrick was not called. No reason is given explaining this remarkable fact. The result of all the evidence on this point is appropriately summed up in the opinion at pages 45 and 46 of the Record, where the court says:

"From the testimony given in the case, we are satisfied that Kilpatrick was not a fellow-servant of the deceased, but was then engaged in a different kind and department of service, and was not in the same common employment, and was under the orders of a different master. Nor can there be any question made but that Kilpatrick heard the signal from Rice to stop the engine, and that he acted upon such signal and did stop the engine about six feet from the car in question, under which the deceased was working at the time. The signal was understood by the switchman, Kilpatrick, and obeyed by him. The verbal communication to Kilpatrick to stop the engine *was a notice and warning as certain, positive, and safe as if there had been a red-flag signal used in such case.* In any event, Kilpatrick received it, understood it and replied to it, and complied with it at the time, and he would have done no more had there been a red-flag signal placed by the car."

Conclusive Effect of General Verdict.

The effect of the general verdict in the case is conclusive, under the state of proofs shown by this Record, to the effect that the defendant below was guilty of negligence, and that the deceased was not guilty of contributory negligence.

The effect of a general verdict is thus stated in the opinion of the court, by Justice Brewer, in the case of *Richmond and Danville Railroad Co.* v. *Powers* (149 U. S., 43–45):

"The only error assigned is in the refusal of the court to instruct the jury, as requested, substantially, that the deceased was guilty of such contributory negligence as to prevent a recovery. It is well settled that where there is *uncertainty* as to the existence of either negligence or contributory negligence, the question is *not one of law, but of fact, and to be settled by a jury;* and this whether the uncertainty arises from a conflict in the testimony or because the facts, *being undisputed*, fair-minded men will honestly draw *different conclusions from them.*"

Citing—

Railroad v. *Stout*, 17 Wall., 657;
Railroad v. *McDade*, 135 U. S., 554;
Railroad v. *Converse*, 139 U. S., 469."

This principle of law alone must be conclusive, in this court, upon the propositions of fact and law that the plaintiff in error was guilty of negligence, and that the deceased was not guilty of contributory negligence. It is conclusive, because it is impossible, rationally, to assert that there was not evidence in the case fully justifying the court in concluding that there was, at least, doubt as to contributory negligence, and, therefore, in leaving it to the jury to decide upon this question, and forbidding the court to withdraw it from the jury.

Special Verdicts.

In addition to the foregoing, it is proper to call the attention of the court to the provisions of the Compiled Laws of Utah, section 3374, which provides that—

"In an action for the recovery of money only, or specific real or personal property, the jury in their discretion may render a general or special verdict. In all other cases *the court may direct the jury * * * to find upon particular questions of fact.*"

Under the provisions of this section, in the case of *Webb* v. *Denver and Rio Grande Railroad Co.* (24 Pacific R., 616), cited by the court below in its opinion (*R., p. 46*), the court held what the syllabus states, in the following words:

"Compiled Laws of Utah, 3374, provides that 'in an action for the recovery of money only, or specific real property, the jury in their discretion may render a general or *special* verdict. In all other cases the court may *direct the jury * * * to find upon particular questions of fact.*' *Held*, That in an action for the wrongful death of the plaintiff's intestate, it is within the discretion of the court to refuse to direct such special findings."

It is, of course, equally within the discretion of the court to direct such special findings; and we here adopt the language of the court below (*R., top p. 47*) in regard to the conclusiveness of such findings of fact. That conclusiveness is the same which we have stated from the case of *Richmond and Danville Railroad* v. *Powers* (*supra*) with reference to a general verdict. The court below states this as follows:

"And the decision of this question ought not to be withheld from the jury *unless* the evidence, after giving the plaintiff the benefit of *every inference* to be fairly drawn from it, so conclusively shows contributory negli-

gence that the court would be *compelled*, in the exercise of sound judicial discretion, to set aside any verdict rendered or returned in his favor."

Citing—

Kaine v. *Northern Central Ry.*, 128 U. S., 91;
Morton v. *Detroit, &c., Ry.*, 46 N. W. Rep., 111;
Detroit and Milwaukee Ry. v. *Steinberg*, 17 Mich., 99.

The foregoing principles and authorities furnish conclusive replies to the said three subdivisions of the second assignment of error. (*R., p. 53.*)

The Overruling of Defendant's Motion for a Non-suit was not Error.

The third assignment (*R., p. 53*) is also subdivided into parts. Subdivision A is that the court below erred in overruling defendant's motion for a non-suit. This motion is found on page 33 of the Record, and was made at the conclusion of the evidence. It requests the court to withdraw the case from the jury, on the ground that there was *no* evidence that could sustain a verdict in favor of the plaintiff.

This the court said could not properly be granted unless it could be affirmatively stated of the evidence in the case that it would not be possible to allow a verdict in favor of plaintiff to stand, because the evidence in her favor was so slight that, after giving her the *benefit of every inference* to be fairly drawn therefrom, it so conclusively showed contributory negligence on the part of plaintiff's intestate, or the absence of negligence on the part of the defendant, that the court would be *compelled*, in the exercise of a sound judicial discretion, to set aside any verdict rendered in her favor.

This position of the court is conclusively established by the cases decided by this court. See *Kaine* v. *Northern*

Central Ry. (128 U. S., 94), and cases there cited; *Richmond and Danville Railroad* v. *Powers* (149 U. S., 45), and cases there cited; *Union Pacific Ry.* v. *McDonald* (152 U. S., 283–4), and cases there cited; and *Randall* v. *Baltimore and Ohio Railroad* (109 U. S., 482), and cases there cited.

These cases, taken together, conclusively establish the following propositions of law:

1. That in every case where the evidence bearing upon questions of negligence or contributory negligence is *doubtful*, the question of the existence of such negligence is one of *fact*, and must, therefore, be left to the jury, the verdict of the jury in regard thereto being conclusive.

2. That the court can never withdraw a case from the jury except where the evidence is so conclusive in favor of one or the other party that the court would be compelled, in the exercise of a sound judicial discretion, to set aside a verdict found in disregard of such conclusive weight of evidence.

Now, it would be, we think, simply ludicrous to attempt an argument to show that, in the case at bar, the evidence was so conclusive, either against there being negligence on the part of defendant below, or in favor of contributory negligence on the part of plaintiff's intestate, as that the court was bound to grant a non-suit. On the contrary, the truth is just as it was stated in the opinion of the court below (*R., p. 44*), that the facts showing negligence and the absence of contributory negligence are "*undisputed*" and, if not conclusive in themselves, are rendered conclusive by the force of the general and special verdicts.

The Question of Fellow-Service is One for the Jury.

Subdivision B of this third assignment is itself subdivided into four parts. The first of these subdivisions is (*R., p. 53*), that the court erred in instructing the jury that if it found that the deceased, Pool, was a car-repairer, and in a different line of service from that of the negligent servant of the defendant, and that Pool's death was caused by said negligent servant, then the defendant was liable.

The next, or second, subdivision of this subdivision B is that the court erred in submitting, as a question of fact, to the jury the question whether the car-repairer, Pool, was a fellow-servant with Kilpatrick, the negligent switchman.

These two assignments amount, in this case, to the same thing, and we consider them together.

This last one is inaccurate in the matter of *fact* as to how the court did instruct the jury. The court instructed the jury on the question of law as to what facts, in law, would constitute a fellow-servant, and submitted to the jury the questions of fact which decided, as a matter of law, the question whether Pool and Kilpatrick were fellow-servants. The court's instruction on this point is found at page 37 of the Record, and is as follows:

"As to the yardmen or switchmen, as they have been called variously in the testimony here, and named, I believe, Kilpatrick and Taylor, the testimony tends to show that they were switchmen or brakemen, I believe; and acting as yardmen while they were in the yards of the defendant company at Ogden, where they were at the time this accident occurred; and as to those, *I simply state to you, gentlemen, the principle of law that governs that, and leave you to determine, as a matter of fact, as to whether they were fellow-servants of the deceased or not.* If they were engaged with the deceased in the same common

employment, and subject to the orders of the same master, immediately, then they were fellow-servants. If, on the other hand, they were engaged in different branches of the service, *wholly* disconnected from each other; if you should find that the defendant, in respect to its service, put it into separate and independent departments, the services of the deceased, Mr. Pool, belonged to one department and these yardmen or switchmen belonged to another, *totally* different and unconnected with each other, then I charge you, as matter of law, that they would not be fellow-servants; they would not be within the rule, or within the meaning of the rule."

It will be observed, in the above extract, that the court says: "I simply state to you, gentlemen, *the prin-* "*ciple of law* that governs that, and leave you to deter- "mine, *as a matter of fact*, whether they were fellow-ser- "vants of the deceased or not." This question as to whether these employés were fellow-servants or not is manifestly a mixed question of law and fact. This being so, it is most thoroughly settled by the decisions of this court, and we believe of all others, that such mixed questions of law and fact are properly left to the jury, to be determined by it *under proper instructions of the court as to the law that enters into them.*

See—

Cooley v. *O'Connor*, 12 Wall., 400;
Wiggins v. *Burkham*, 10 Wall., 129, 133;
Bank v. *Morgan*, 117 U. S., 122;
Kaine v. *R. R. Co.*, 128 U. S., 96.

It is only where there is *no* dispute about the facts that enter into the question that the court is justified in deciding the question without the finding of the jury on the undisputed facts entering into the question.

See, *Toland* v. *Sprague*, 12 Pet., 336.

We turn now to notice some of the cases asserting still more directly the position we here maintain:

In *Railroad Company* v. *Morgenstern* (106 Ill., 216), decided by the Supreme Court of Illinois in 1883, the action there was under an act like Lord Campbell's act, and was brought by the administrator of Hugo Eilenstine, an employé of the defendant in the capacity of inspector of rolling-stock of the company, whose duty it was on the arrival of trains at Mattoon to be present to examine the wheels and trucks to see whether they were in good repair, and as such inspector he had nothing to do with running trains, as was claimed, and his duties were totally disconnected from the running department. Eilenstine's death was caused by the alleged negligence of Solomon Bray, an employé of defendant, employed in the capacity of baggage-master, whose duty it was to assist in loading and unloading baggage from baggage cars; and it was claimed that Bray so negligently loaded a truck with baggage that one of the trunks fell upon the deceased when passing him at the place where he was stooping, engaged in his occupation of testing the condition of car wheels, and caused his death. The question whether Eilenstine and Bray were fellow-servants thus came into the case, and was disposed of by the court as indicated in the following extracts, the first being the second paragraph of the head-note and the second from the opinion of the court by Justice Craig. (p. 220.)

After announcing in the first paragraph of the head-note that the court was precluded from examining any controverted questions of fact settled by the court and jury below, the second paragraph accurately states what was decided as to the point now in question, in these words:

"The definition of negligence is a question of law, but it is a question of fact whether a particular case falls within that definition; and the same rule may be applied to the question who are fellow-servants of the same master. As to whether negligence in fact is shown, and

whether the party killed thereby was a fellow-servant, and received the injury from another servant of the same master, in the same line of duty, bringing them often together, co-operating in the same work, this court is precluded from determining."

Said extract from the opinion is as follows:

"It is also contended that the deceased and Bray, the baggage-master, were fellow-servants, and upon that account no recovery can be had. In *Great Western R. R.* v. *Howort* (39 Ill., 346) it was held that negligence is not a legal question, but is one of fact, and must be proved like any other. This was followed by *Chicago and Alton R. R. Co.* v. *Pennell* (94 Ill., 448), where the same doctrine was announced. In *Pennsylvania Co.* v. *Conlan* (101 Ill., 93), what was said in the cases cited was approved; and it was further held that the definition of negligence was a question of law, and it was a question of fact to be determined from the evidence whether the particular case falls within the definition.

"What has been said in relation to the question of negligence may also be said in regard to fellow-servants. The definition of fellow-servants may be a question of law, but it is always a question of fact, to be determined from the evidence, whether a given case falls within that definition. Whether the deceased and Bray were fellow-servants depended upon a variety of facts, which had to be proven before the jury. The inquiry would arise whether they were in the service of a common master; were they engaged in the same line of employment; were the existing relations between them of such a character and their duties such as to bring them often together, co-operating in a particular work. These, and perhaps other facts of a kindred character, were matters to be proven before the jury, and from the facts thus proven it was for the jury then to say whether the two servants, in the discharge of their duties, were fellows. Had the appellant desired to raise the question for decision in this court whether, under the evidence, the deceased and Bray were fellow-servants, it might have done so by an appropriate instruction, but under the statute we can not review the evidence, and from it determine the question."

This case is also reported in *12 American and English Railroad Cases, page 228.*

This case of *Railway Co.* v. *Morgenstern* (*supra*) is approved and reaffirmed, by the same court in 1884, in *Railway Co.* v. *Moranda* (108 Illinois, 576). See fourth paragraph of the syllabus (*p. 577*); also, the opinion of the court (*pp. 581–582, 108 Ills.*)

This last case of *Railway Co.* v. *Moranda* is also reported in *17 American and English Railroad Cases, page 564.*

These two cases of Morgenstern and Moranda were again reviewed and reaffirmed in *Railroad* v. *Kelley*, decided in the same court in 1889 (127 Ill., 637–642), affirming the doctrine that the question whether the deceased and those fellow-employés whose negligence caused the death were fellow-servants was a question of fact to be determined from the evidence by the jury.

To these Illinois cases we, in passing, beg leave to refer the court, as strongly supporting our position upon the additional proposition, that Pool and Kilpatrick were not fellow-servants.

The case of *Haas* v. *Philadelphia and Southern Steamship Co.*, decided in 1879 (88 Pa. St. 269), decides the same exact question, as indicated by the last paragraph of the head-note, where, after stating the facts, the syllabus adds these words:

"*Held*, That the questions whether the stevedore was an agent of the company, or an independent contractor, and whether the plaintiff was a fellow-servant in a common employment, were properly submitted to the jury."

See the same thing in the opinion of the court (*p. 276*).

In *Mullan* v. *Philadelphia and Southern Mail Steamship Co.*, decided in the Supreme Court of Pennsylvania, in 1875, opinion by Justice Woodward (28 P. F. Smith, 25; 78 Pa. St., 25), the same precise question is decided, and is expressed in the head-note in these words:

"Whether the stevedore was a fellow-workman of the plaintiff, and whether the negligence of the mate in

splicing the rope was a risk assumed by the plaintiff, were, under the circumstances, for the jury."

See the same thing in the opinion (*pages 32–33.*)

Under these authorities, which might be indefinitely multiplied, we submit that it is conclusively established that there is no error involved in the second specification, under subdivision B, of the third assignment of errors, found at folio 109, to wit, that which assigns for error the fact that the court is alleged to have submitted the question whether the deceased, Pool, and Kilpatrick, were fellow-servants, to the jury.

If it be said that this question ought not to have been submitted to the jury because the facts affecting the question of fellow-servant were undisputed, then the obvious reply is that even if they were *all* undisputed and were *all* admitted by the state of the issue between the parties (which was not wholly true), yet, so far as the facts were admitted, or uncontroverted, *they were all in favor of the contention of the plaintiff, and were all in accordance* with the finding of the jury; and even if the court *might* have, properly, owing to said admission as to the state of the facts, decided against the defendant this question of fellow-servant, by instructing the jury that the *admitted facts* showed that Pool was not a fellow-servant of Kilpatrick, without leaving it to the jury, yet, under *that* state of things, *the defendant was not injured by so leaving it to the jury*, and, for this reason, can not make available this assignment of alleged error.

Here, adopting the words of this court in *Lancaster* v. *Collins* (115 U. S., 227):

"No judgment should be reversed in a court of error when it is clear that the error could not have prejudiced and did not prejudice. (*Deery* v. *Cray*, 5 Wall., 795; *Gregg* v. *Mass*, 14 Wall., 564–569; *Lucas* v. *Brooks*, 18 Wall., 436–454; *Allis* v. *Insurance Co.*, 97 U. S., 144–145; *Cannon* v. *Pratt*, 99 U. S., 619–623; *Mining Co.* v. *Taylor*, 100 U. S., 37–42; *Hornbuckel* v. *Stafford*, 111 U. S., 389–394.")

Fellow-Servant.

We will now consider the question as to whether or not Kilpatrick, the negligent employé of the company, was a fellow-servant with the deceased, Pool.

Kilpatrick was a switchman and brakemen (*R., p. 45, fol. 93*) in the defendant company's yards at Ogden. (*R., fols. 28–9, 33–4–6, 42–5, 51–2–5.*) He was, as all switchmen are, directly under the supervision of the superintendent and yardmaster. (*R., fols. 55–6–7, 66.*) The duties of a switchman are to make up trains in the yard, to switch incoming trains, to deliver cars where they are supposed to go, etc. (*R., fols. 42–3–7–8.*) The duties of the deceased, Pool, were those of a laborer in the company's repair shops (*R., fols. 14, 18, 29*), and he, like all other such laborers, was subject to the orders of the foreman of the repair shops. (*R., fols. 17, 20, 43, 54–9, 60.*)

These two employés were under entirely distinct overseership or supervision, were in entirely distinct and separate places, and their employments were as distinct from each other as the building of cars is distinct from the running of them. These facts are not only proved by the uncontradicted evidence, but are also established by the legal effect of the general verdict.

In view of the condition of the decisions regarding this matter, as to what constitutes a fellow-servant within the meaning of the legal principle here involved, as that condition is described in the opinion of the majority of the court, by Justice Brown, in the case of *Northern Pacific Railroad* v. *Hambly* (154 U. S., 355–6), here adopting the words of the court (*p. 355*), "it is useless to "attempt an analysis of the cases which have arisen in "the several States, since they are wholly irreconcilable "in principle, and too numerous even to justify citation."

In this opinion it is intimated (*p. 356*) that, even in this court, the cases involving the question of fellow-service have not been, "perhaps, altogether harmonious."

But we are, in the case at bar, notwithstanding this confusion of cases, here so strongly stated, relieved from the necessity of entering into or exploring this wilderness of decisions by reason of the fact that, whatever conflict of decision may exist as to other classes of cases than that of laborers engaged in building or repairing cars and those whose duties connect them with the making up and running of trains, there is, as to these last-named classes, no conflict in the decisions of this court in placing these two classes so wholly distinct and independent of each other as that the persons engaged in them respectively are not fellow-servants within the rule now under consideration.

This case of *Northern Pacific Railroad* v. *Hambly*, is one in which the court divided, three of the justices, to wit, the Chief Justice and Justices Field and Harlan, dissenting from the conclusion reached by the majority of the court; namely, that a common laborer in the employ of a railroad company, while engaged under the direction of a section-boss, or foreman, in repairing a culvert on the line of the company's road, was a fellow-servant with the engineer and conductor who were engaged in moving and operating passenger trains on said line of road. This is an opinion, therefore, in which, not only because of the importance of the question, but because, also, of the division in the opinion of the court, must, in every part of the majority opinion, have received the most careful consideration.

If, therefore, we find in this majority opinion the doctrine laid down that laborers engaged in building or repairing cars are not fellow-servants with those engaged in the making up and starting or running of trains, or if we find in this majority opinion cases approved and

reaffirmed which so hold the law to be, then we may safely assume that this Hambly case is a solemn assertion of the doctrine for which, in the case at bar, we contend, and which was applied thereto in the court below, namely, that a man engaged in the repairing of cars, and under the separate supervision of a foreman of the repair shops, is not a fellow-servant with a switchman or brakeman (*R., p. 45, fol. 93*) who is engaged in keeping the track clear for the passage of trains, and whose duties are to make up trains in the yard, to switch incoming trains, and to deliver cars where they are supposed to go, etc. (*R., fols. 42–3–7–8.*)

But this, just stated, we do find most distinctly laid down in the opinion of the majority of the court at pages 357 and 358 of 154 United States Reports. The language of the court upon this point is as follows:

"As a laborer upon a railroad track, either in switching trains or repairing the track, is constantly exposed to the danger of passing trains, and bound to look out for them, any negligence in the management of such trains is a risk which may or should be contemplated by him in entering the service of the company. This is probably the most satisfactory test of liability. If the departments of the two servants are so far separated from each other that the possibility of coming in contact, and hence of incurring danger from the negligent performance of the duties of such other department, could not be said to be within the contemplation of the person injured, the doctrine of fellow-service should *not* apply. *In this view it is not difficult to reconcile the numerous cases which hold that the persons whose duty it is to keep railroad cars in good order and repair are not engaged in a common employment with those who run or operate them.* The case of *Northern Pacific Railroad* v. *Herbert*, 116 U. S., 642, is an illustration of this principle. *The plaintiff in this case was a brakeman in defendant's yard at Bismarck, where its cars were switched upon different tracks and its trains were made up from the road. He received an injury from a defective brake, which had been allowed to get out of repair through*

the negligence of an officer or agent of the company who was charged with the duty of keeping the cars in order. It was held, upon great unanimity of authority, both in this country and in England, that the person receiving and the person causing the injury did not occupy the relative position of fellow-servants. See also *Hough* v. *Railway Co.*, 100 U. S., 213; *Union Pacific Ry.* v. *Daniels*, 152 U. S., 684. Even in Massachusetts, whose courts have leaned as far as any in this country in supporting the doctrine of fellow-service, *it has been held that agents who are charged with the duty of supplying safe machinery are not to be regarded as fellow-servants with those who are engaged in operating it. Ford* v. *Fitchburg Railroad*, 110 Mass., 240."

Here, as will be seen, the case of *Northern Pacific Railroad* v. *Herbert* (116 U. S., 642) is distinctly approved and affirmed; and the leading features and facts of the case are set out and approved (*p. 357*), thus showing a careful reaffirmance. In that case, as in the case at bar, the plaintiff was a brakeman or switchman in the company's yard at Bismarck. He received an injury from a defective brake which had been allowed to get out of repair through the negligence of an employé of the company *charged with the duty of keeping the cars in order. The two employés belonged, respectively, to the two identical classes to which the two employés belonged in the case at bar.* One was a car repairer, the other was a switchman. Of this Herbert case the court says (154 U. S., 357):

"It was held upon great unanimity of authority, both in this country and in England, *that the persons receiving and the persons causing the injury did not occupy the relative position of fellow-servants.*"

It would be impossible to state more distinctly and unmistakably a reaffirmance of the doctrine of this case of Herbert than is here found.

Turning now to the opinion of Justice Field in the said case of the *Northern Pacific Railroad* v. *Herbert* (116 U. S., 653), we find stated the rule in regard to fellow-service, and the principle upon which it is based, as follows:

"We do not consider that the first of these sections" (referring to sections 1130 and 1131 of the Civil Code of the Territory of Dakota) "*changes the law previously existing as to the exemption of an employer from responsibility for injuries committed by a servant to a fellow-servant in the same general business, or identifies the business of providing safe machinery and keeping it in repair with the business of handling and moving it. The two kinds of business are as distinct as the making and repairing of a carriage is from the running of it. They are, as stated in the case decided by the Supreme Court of Massachusetts, from which we have cited above, separate and independent departments of service, though the same person may, by turns, render service in each.*"

The case in Massachusetts referred to is that of *Ford* v. *Fitchburg Railroad Co.* (110 Mass., 240). At page 650 (116 U. S.) the court states the character of this Massachusetts case. Massachusetts is one of the States which the opinion classes as amongst the extreme States holding to an enlarged application of the rule relating to fellow-servants. The first paragraph of the syllabus in this case of *Ford* v. *Fitchburg Railroad* (110 Mass., 240), thus states the principle relating to fellow-servants there decided:

"One employed by a railroad corporation *to drive a locomotive engine over its road* may recover damages against the corporation for personal injuries caused by a defect in the engine, which was due to the *neglect of the agents of the corporation charged with keeping the engine in proper repair*, although the directors and superintendent had no reason to suspect negligence or incompetence on the part of such agents."

These doctrines are reaffirmed by this court in the case of the *Union Pacific Railway* v. *Daniels* (152 U. S., 688–9).

Although, as we have remarked, it may not be permissible, nor be prudent, for us to enter upon the vast body of cases which relate to this matter of fellow-service, yet we think it quite permissible for us to refer to a few of

the cases *which have recently received the sanction of this court.*

The case of *Corcoran* v. *Holbrook* (59 N. Y., 517), was approved by this court in Herbert's case. There an employé was injured by the fall of an elevator which was permitted to get out of order by the negligence of a co-employé. The court there held that the defendants, the owners of the building, were liable, and that the general agent was not a mere fellow-servant with the deceased, but occupied the place of the employers.

A similar case is that of *Fuller* v. *Jewett* (80 N. Y., 46), also cited and approved in the Herbert case (116 U. S., 649); and of the same class of cases is that of *Shanny* v. *Androscoggin Mills* (66 Maine, 420), also approved and cited by this court in Herbert's case (p. 651).

This court, in the case of *Railroad Co.* v. *Ross* (112 U. S., 388) expressly approves the language of the Lord Chancellor, as found in the case of *McNaughton* v. *Caledonia Railway Co.* (19 Ct. Sessions Cases, 271), and which Scotch case laid down the doctrine which the court below affirmed in the case at bar, in a case where the relation of the two servants to each other was identical with that in the case at bar.

So that here again we have this court holding that one whose business as an employé of a company was keeping cars in repair, was not a fellow-servant with one who arranged the switches or managed the trains. The following is the language of this court in regard to this case:

"The Lord Chancellor also commented upon some decisions of the Scotch courts, and, among others, that of *McNaughton* v. *The Caledonia Railway Co.* (19 Court of Sessions Cases, 271), and said that *it might be 'sustained without conflicting with the English authorities, on the ground that the workmen in that case were engaged in totally different departments of work, the deceased being a joiner or carpenter, who, at the time of the accident, was engaged in repairing a railway carriage, and the persons by whose negligence his*

death was occasioned were the engine driver and the persons who arranged the switches.' And in the same case Lord Brougham, after mentioning the observations of a judge of the Scotch courts that an absolute and inflexible rule, releasing the master from liability in every case where one servant is injured by the fault of another, was utterly unknown to the law of Scotland, said that it was also utterly unknown to the law of England, and added: 'To bring the case within the exemption, there must be this most material qualification, that the two servants must be men in the same common employment and engaged in the same common work under that common employment.'"

The thing decided in this case of *Railroad Co.* v. *Ross* bearing upon our present point of fellow-service is thus expressed in the head-notes (112 U. S, 377):

"A conductor of a railroad train, who has the right to command the movements of the train, and to control the persons employed upon it, represents the company while performing these duties, and does *not* bear the relation of fellow-servant to the engineer and other employés of the corporation on the train."

This case of *Railroad Co.* v. *Ross* is cited with approval in *Northern Pacific Railroad Co.* v. *Herbert* (116 U. S., 647, *supra*), and also in the case of *Railroad Co.* v. *Mackey* (127 U. S., 208); also in the opinion by Justice Brewer in *Van Avery* v. *Railroad Co.* (35 Fed. Rep., 41); also in *Howard* v. *Railroad Co.* (26 Fed. Rep., 840), in an opinion by the same Justice, and also in a countless number of other cases in the Circuit Courts of the United States.

When, therefore, this court, in this case of *Railroad Co.* v. *Ross*, expressly approves the said decision in *McNaughton* v. *Caledonia Railway Co.* (19 Court of Session Cases, 271), it therein and thereby expressly decides our present point, to wit, that the deceased, Pool, was not a fellow-servant with Kilpatrick in the services being rendered by them, respectively, at the time of Pool's death.

A multiplication of citations from other cases than those made by this court, or those approved by this court, can not possibly be useful, and, therefore, we here leave this point in the case.

The Other Alleged Errors.

The third specification under said subdivision B (*R., fol. 109*), alleging that the court erred in instructing the jury that the trainmen and yardmen of the defendant were not fellow-servants, is one which is also inaccurate as a matter of fact. The court did not so instruct, and, besides, this assignment is answered by what we have elsewhere already gone over.

The fourth specification under said subdivision B (*R., fol. 100*), alleging error in instructing the jury that "in "estimating damages they should determine the number "of the family of the deceased, the number of children, "and the ages of the family," is one to which we reply as follows:

It will be observed that section 2962 of the Compiled Laws of Utah (*R., p. 47, fol. 97*) provides that the amount recovered in actions for wrongfully causing death "shall "be distributed by direction and decree of the proper "probate court to such persons (other than creditors) as "are, by law, entitled to distributive shares of the estate "of such deceased person, in such proportions as are pre-"scribed by law."

Hence, manifestly, the children, being beneficiaries, their ages, necessities, number, etc., become, and are, essential elements entering into the matter of damages.

In the case of *Breckenfelder* v. *Railway Co.* (79 Mich., 560–4), decided in 1890, in the Supreme Court of Michigan, the court concludes its opinion in these words:

"Under the statute giving a right of action in cases of this kind, it was not error to permit testimony showing the number and ages of the children of the deceased, who were dependent upon him for support. The plaintiff

sues in a representative capacity for the benefit of all interested under the statute."

The statute under which this Michigan case was prosecuted is identical with the equivalent section of the Utah statute, found at page 47, folio 97, of the Record.

In *Railroad Co.* v. *Decker* (84 Pa. St., 419), the suit was brought under a statute like the one under which the present action is prosecuted, and, so far as relates to the beneficiaries, is similar to said act of Utah. In that case the court held that the widow and children of the deceased being the beneficiaries under the statute, evidence as to their age and number was proper.

Even where the statute gives a right of action for the benefit of the widow alone, it is held, nevertheless, that, as the burden of supporting minor children is imposed upon her, evidence of their number and age is admissible to show the extent of the burden cast upon the widow by the death complained of.

See Tiffany on Death by Wrongful Act, sec. 161 (*p. 192*), and cases cited in Notes 46, 47, and 48; also—

Tetherow v. *Railroad Co.*, 98 Mo., 74;
Soeder v. *Railroad Co.*, 100 Mo., 673;
Railroad Co. v. *Wilson*, 48 Fed. Rep., 57.

The specification C under the third subdivision of the assignment of error (*R., p. 53, fols. 109, 110*), that the court erred in giving the instructions which it gave on its own motion, and in giving "such" (each) distinct part thereof, is worthless because of its generality.

See, Rule 4; 2 Wall., 328; *id.*, 295; 93 U. S., 54, and cases cited; 103 U. S., 98; *id.*, 73; *id*, 266; 111 U. S., 337.

In *Block* v. *Darling* (140 U. S., 238), this court condemned as worthless an exception taken in substantially the very words of the exception to the charge in the present case. (*R., p. 53.*)

But, aside from this, it is plain, on a careful review of the entire charge, that it contained no error.

Exception E (*R., p. 53, fol. 110*), in refusing the peremptory instruction to find for the defendant, we have already considered as fully as we care to, under the head of "*The Overruling of Defendant's Motion for a Nonsuit Was Not Error.*"

Exception D (*R., p. 53, fol. 110*) is, as to the court giving the instructions asked by the plaintiff, "and in giving any or either of them."

We fail to find in the Record any instructions asked by plaintiff, or any such that were granted. The attorney for plaintiff (*R., p. 39, fol. 80*) did say to the court, during its charge, that he did not notice anything in the charge as to the burden of proof regarding contributory negligence; but he submitted no request. Thereupon the court properly instructed the jury that the burden of proof as to this was on the defendant where the plaintiff's evidence shows no want of care on the plaintiff's part.

That this very guarded instruction was not erroneous (at least as against the defendant) is too plain to admit of useful argument.

See *Railroad Co.*, v. *Horst*, 93 U. S., 291–298;
Stokes v. *Saltonstall*, 13 Pet., 185;
Railroad Co. v. *Gladmon*, 15 Wall., 407–8;
Hough v. *Railroad Co.*, 100 U. S., 225–6;
Smith v. *Ewing*, 23 Fed. Rep., 740;
Reddon v. *Railway Co.*, 15 Pacific Rep., 262;
Bowers v. *Railway Co.*, 7 Pacific Rep., 251.

If there is in this Record any matter not noticed by this brief, and which will seem to us to require notice, we will, if the court please, notice them in the oral argument. We think there are none; and, therefore, here leave the case, in perfect confidence that the judgment below must be affirmed.

SAMUEL SHELLABARGER,
J. M. WILSON,
For Defendant in Error.